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IN THE

Supreme Court of the United States

October Term, 1954

HONORABLE MICHAEL L. IGOE, Judge of the United States District Court for the Northern District of Illinois, Eastern Division, *Petitioner*

v.

CHICAGO, ROCK ISLAND AND PACIFIC RAILROAD COMPANY

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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The Honorable Michael L. Igoe, Judge of the United States District Court for the Northern District of Illinois, Eastern Division, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit, which ordered that a writ of mandamus issue directing the petitioner (1) to vacate his order of July 2, 1954 denying defendant's motion for a change of venue in the case of *Claudine M. Mikesell* v. *Chicago, Rock Island and Pacific Railroad Company*, No. 52 C 2124, and (2) to enter an order transferring said cause to the Southern District of Iowa.

OPINIONS BELOW

The first opinion of the Court of Appeals in these proceedings (App. 17a) remanding the cause with directions

to the petitioner to vacate his original order of June 30, 1953, denying defendant's motion to transfer, and to reconsider the motion in the light of the views expressed by the Court of Appeals, is reported at 212 F. (2d) 378. Petitioner's memorandum opinion (App. 32a) denying the motion to transfer after further consideration in accordance with the mandate of the Court of Appeals, is not reported. The opinion of the Court of Appeals, filed February 16, 1955 (App. 34a) pursuant to which the writ of mandamus was ordered to issue vacating petitioner's order of July 2, 1954, and directing that the cause be transferred, is not yet reported.

JURISDICTION

The judgment of the Court of Appeals vacating petitioner's second order denying transfer, and ordering that the cause be transferred, was entered on February 16, 1955. The Court of Appeals has stayed its judgment pending the decision of this Court. The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

QUESTION PRESENTED

Whether on petition for a writ of mandamus a Court of Appeals may review an order of a district court denying a motion for transfer under 28 U.S.C. 1404(a), and issue a writ of mandamus directing the district court to transfer the action to a district court in another Circuit, where the Court of Appeals concludes that the district court, although applying the proper legal standards, has "abused its discretion" by arriving on conflicting facts at a judgment which the Court of Appe[illegible] deems "clearly erroneous."[1] Among the included inquiries is the question of whether mandamus is ever an available remedy to

[1] If certiorari is granted, the petitioners will also seek to demonstrate that on the facts the district court's denial of transfer was not an "abuse of discretion," however minimal a definition that phrase may be given. *McAllister* v. *United States*, 348 U.S. 19, 20-21.

correct an alleged "abuse of discretion" by the district court in denying a transfer and retaining valid jurisdiction in the forum selected by the plaintiff.

STATUTES INVOLVED

The case involves a motion for change of venue under 28 U. S. C. 1404 (a) (Act of June 25, 1948, 62 Stat. 937):

> § 1404. Change of Venue.
>
> (a) For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought.

The pertinent provisions of 28 U. S. C. 1651 (a)—the All Writs Statute (Act of June 25, 1948, 62 Stat. 933, amended by Act of May 24, 1949, 63 Stat. 102)—reads:

> § 1651. Writs.
>
> (a) The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.

28 U. S. C. § 1291 (Act of June 25, 1948, 62 Stat. 929) provides in part:

> § 1291. Final Decisions of District Courts.
>
> The courts of appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United States * * *

STATEMENT

On September 13, 1952, Claudine M. Mikesell, Administratrix of the Estate of Charles Delbert Mikesell, filed an action in the Superior Court of Cook County, Illinois,

against the Chicago, Rock Island and Pacific Railroad Company, asking judgment of $100,000 for the wrongful death of her husband in a railroad crossing accident at Avoca, Iowa. (App. 17a). On October 6, 1952, the defendant railroad removed the action to the United States District Court for the Northern District of Illinois, Eastern Division, Seventh Circuit, sitting in Chicago, Illinois, on the ground of diversity of citizenship, it then appearing that the defendant was a Delaware corporation and the plaintiff a resident of Iowa. On October 10, 1952, the defendant railroad filed a motion under 28 U. S. C. 1404 (a) to transfer the action to either the Central Division (Des Moines) or the Western Division (Council Bluffs) of the United States District Court for the Southern District of Iowa, in the Eighth Circuit. (App. 1a). The motion was supported by an affidavit alleging, *inter alia*, that the accident occurred in the District to which transfer was sought, that defendant's witnesses resided at Avoca or Des Moines in that District and eight of them were non-employees not subject to process in the Northern District of Illinois, that the rail distances from Des Moines and Avoca to Chicago were such that the loss of time and expense involved in transporting witnesses would be substantial, and that trial in Chicago would be excessively costly to defendant. (App. 3a). The plaintiff filed objections to the transfer, alleging, *inter alia*, that defendant's principal place of business was in Chicago; that, if transferred, the case would not be heard at Avoca, the scene of the accident and alleged location of the witnesses, but rather at Des Moines or Council Bluffs, and that the rail service between Avoca, Council Bluffs, Des Moines, and Chicago, was such as to give little if any advantage to either of the proposed transferee Divisions over Chicago so far as the convenience of parties or witnesses was concerned; that Des Moines is an insurance center in which plaintiff would not obtain trial in

an impartial atmosphere; and that she is a widow of moderate means, and the expense and inconvenience of hiring an attorney and prosecuting her claim in Iowa would impose a real burden and hardship upon her. (App. 7a) On June 30, 1953, Judge Igoe denied the motion to transfer. (App. 16a).

On August 4, 1953, defendant railroad applied to the Court of Appeals for a writ of mandamus directing Judge Igoe to vacate his order denying transfer, and to enter an order transferring the cause to the Southern District of Iowa. (App. 17a). Attorneys for the plaintiff, acting for Judge Igoe, opposed the petition on the ground, among others, that mandamus was not available to review the action of a District Court denying a motion to transfer.

The Court of Appeals on April 20, 1954, recognizing the conflict among the circuits on the question as to whether or not mandamus would lie, held that it possessed jurisdiction "to review orders relative to transfer under Section 1404 (a) by way of mandamus." The writ was not awarded, but the cause was remanded to the District Court to determine the motion in the light of the standards of the statute as interpreted by the Court of Appeals. The Court of Appeals specifically pointed out that "ultimate decision . . . is within the province of the District Court, and we cannot, as petitioner would have us do, usurp its function and decide the question in this court." (App. 17a)

On remand the plaintiff filed an additional affidavit disclosing that on May 2, 1953, she had married M. L. Davis, an employee of a Chicago, Illinois business concern; that she had moved with her husband and two children to Lombard, Illinois, within the Northern District, where her children, who had been adopted by Mr. Davis, were enrolled in the public schools; that she and her husband had purchased a home, maintained a bank account, and were registered to vote in the District in which the suit was pend-

ing, and considered it their permanent residence. (App. 27a). Plaintiff also file dthe affidavit of William Davis, her brother-in-law, confirming these facts. (App. 30a).

Defendant railroad company made no further proffer in support of its motion.

On July 2, 1954, Judge Igoe filed a memorandum opinion stating that he had given further consideration to the motion to transfer, the pleadings, and the affidavits, and had "reached the conclusion that it would not be for the convenience of the parties and witnesses, nor in the interests of justice to transfer this case," (App. 33a) and an order denying the motion to transfer was thereupon entered. (App. 33a).

Notwithstanding that the Court of Appeals had in its first opinion held that ultimate decision on the defendant railroad's motion to transfer was within the province of the district court and would not be usurped by the Court of Appeals, the railroad company on August 7, 1954, filed a second petition identical with its original petition and seeking the same relief. Judge Igoe moved to dismiss on the ground that the same matter had already been adjudicated on the prior petition, and filed an answer in the alternative.

The second petition for the writ was argued twice before the Court of Appeals; on the second occasion before the first *en banc* Court convened in the long history of the Seventh Circuit.

On February 16, 1955, the Court of Appeals granted the writ, directing Judge Igoe to transfer the cause to the Southern District of Iowa, in the Eighth Circuit (App. 34a). Judge Finnegan filed a dissenting opinion (App. 42a).

The majority opinion concerned itself with the factual dispute as to which was the more convenient forum, including consideration of an assumed greater congestion of the

trial calendar of the Northern District of Illinois.[2] There was no suggestion that Judge Igoe had erred in any matter of law. The Court of Appeals adopted the view that a writ of mandamus would issue to compel the transfer where on an examination of the facts the appellate court concluded that the judgment with respect to the "balance" of convenience made on these facts by the District Court was not simply erroneous, but "so clearly erroneous as to amount to an abuse of discretion."

Judge Finnegan dissented on the ground that the Court of Appeals had merely substituted its discretion for that of the district court, where it was vested by statute. He stated that "the majority's opinion is not a demonstration of discretion abused below, but rather a sliding scale of judgment values between reviewing tribunal and trial court." Noting Judge Goodrich's comments[3] on the conflict between the purpose of Section 1404 (a) to make the business of the courts easier, quicker and less expensive, and the expense and delay that are attendant upon the interlocutory review of such orders by mandamus, Judge Finnegan concluded, "More slides into abdication today, than a mere order of transfer finally wrested from our court."

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[2] The median time interval between the filing and disposition of civil cases in the Northern District of Illinois during the fiscal year ending June 30, 1954 was 10.6 months. The same median time interval in civil cases tried in the Southern District of Iowa during the fiscal years 1953 and 1954, was 8.9 months—a difference of less than two months. *Annual Report of the Director of the Administrative Office of the United States Courts 1954*, Table C6, pp. 170-171.

[3] *All States Freight* v. *Modarelli*, 196 F. (2d) 1010, 1011, 1012 (C.A. 3).

REASONS FOR GRANTING THE WRIT

The effect of the decision below is to permit by writ of mandamus an interlocutory review on questions of both fact and law of a district court order on motion to transfer —an order which is admittedly non-appealable. Motions to transfer have become almost invariable routine in diversity cases in the federal courts. The potential burden thus imposed upon the appellate courts is reflected in the fact that during the fiscal year ending June 30, 1954, 324 civil cases were ordered transferred from one federal district court to another.[4] Denials of transfer presumably ran much higher.

The underlying personal injury action was commenced almost three years ago against the defendant railroad by the widow-administratrix in an Illinois state court having jurisdiction over the subject matter and parties. The case is not yet at issue. The delay has resulted entirely from two appellate reviews through mandamus proceedings of a non-appealable order denying transfer under 28 U.S.C. 1404 (a)—a statute intended to enhance the speed, efficiency and economy of litigation in the federal courts.

The decision of the Court of Appeals of the Seventh Circuit making the writ of mandamus available in the circumstances of this case presents a direct conflict with decisions in other Circuits upon an issue of procedural law of major importance in the administration of justice in the federal courts. This question has been twice reserved for later decision by this Court. The decision of the question below is clearly in conflict in principle with applicable decisions of this Court.

Conflict Among the Circuits

The court below directly decided that on petition for writ of mandamus under Section 1651 (a), a Court of Appeals may, and should, review the order of a district court deny-

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[4] *Annual Report of the Director of the Administrative Office of the United States Courts, 1954*, Table C4, p. 160.

ing a motion under Section 1404 (a) for transfer to a district court in another circuit, both to determine whether the district court has exercised a discretion legally vested in it by Section 1404 (a), and to determine whether the district court, although exercising the discretion legally vested in it in accordance with the statutory standards, has arrived at a judgment in balancing the factual considerations involved, which the Court of Appeals concludes on re-examination of these factual considerations to have been "clearly erroneous."

The holding of the Court below that the factual judgment reached by the District Court may and should be reviewed on petition for mandamus and the writ issued if the Court of Appeals concludes that the factual judgment of the district court is so "clearly erroneous" as to constitute an "abuse of discretion", is in direct conflict with decisions on the same question by the Courts of Appeal of the First and Third Circuits. *In re Josephson*, 218 F. (2d) 174, 182, 186 (C. A. 1);[5] *All States Freight, Inc.* v. *Modarelli*, 196 F. (2d) 1010, 1012 (C. A. 3).[6]

The result of the district court's denial of the motion to transfer was to retain the action within the Seventh Cir-

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[5] At page 182 of 218 F. (2d), Chief Judge Magruder stated: "As to the second of these contentions, that the order of transfer was an 'abuse of discretion' under the circumstances, we are clear that as a matter of general policy we ought not to go into that in the present (mandamus) proceeding." At page 186 of 218 F. (2d): "Accordingly, we serve notice that in the future, except in really extraordinary situations the nature of which we shall not undertake to formulate in advance, we shall stop such mandamus proceedings at the very threshold, by dening leave to file the petition for a writ of mandamus."

[6] At page 1012 of 196 F. (2d) Judge Goodrich, speaking for the Court *en banc*, stated: "We do not propose to grant such

cuit, and subject to ultimate appellate review by the Court of Appeals of that Circuit. The decision of the Court of Appeals that a petition for writ of mandamus to review the order denying transfer might be entertained under these circumstances conflicts in principle with decisions of the Courts of Appeal of the First and Eighth Circuits, which hold that 28 U. S. C. 1651 (a) confers the power to issue extraordinary writs only "in aid" of the appellate jurisdiction of a Court of Appeals, and that there is no power to issue such a writ except where the action of the district court may impair or defeat the actual or potential appellate jurisdiction of the Court of Appeals over the cause. *In re Josephson*, 218 F. 2d 174, 181 (C. A. 1);[7] *Carr* v. *Donohoe*, 201 F. (2d) 426, 428, 429 (C.A. 8).

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review where the judge in the district court has considered the interests stipulated in the statute and decided thereon.[3] Our policy was indicated in our decision in Gulf Research and Development Company v. Leahy which concerned a different section of the Code. The discussion there regarding the reason why caution should be exercised with regard to granting mandamus against a judge is fully applicable here.

"We realize that the view we express is not the one which some of our judicial brethren are following with regard to this statute. But we cannot escape the conclusion that it will be highly unfortunate if the result of an attempted procedural improvement is to subject parties to two lawsuits: first, prolonged litigation to determine the place where a case is to be tried; and second, the merits of the alleged cause of action itself.

"[3] We granted it once, not to review the exercise of a judge's discretion, but to indicate that the discretion should be exercised. *Paramount Pictures* v. *Rodney*, 3 Cir., 1951, 186 F. 2d 111."

[7] At page 181 of 218 F. (2d), Chief Judge Magruder stated: "If the district judge had held on to the case, i.e., had denied the motion for transfer, such action would have preserved, not frustrated, any potential appellate jurisdiction which we might have had; and we are at a loss to understand how we could properly review on mandamus an order denying a transfer, on the pretense that such a review would be in 'aid' of our appellate jurisdiction."

In *Carr* the Court of Appeals for the Eighth Circuit declined to permit the use of a petition for mandamus to review an order of a District Court transferring an action to another District within the Eighth Circuit. The Ninth Circuit would entertain a petition for mandamus in these circumstances, even though the District Court had declined to transfer, where it appeared that the District Court was without power as a matter of law to order the transfer sought. *Shapiro* v. *Bonanza Hotel Co. Inc.*, 185 F. (2d) 777 (C.A. 9). The Court of Appeals for the Second Circuit holds that it may issue a writ of mandamus "in aid" of the general federal appellate jurisdiction, but not to protect its appellate jurisdiction as distinguished from the appellate jurisdiction of another federal Court of Appeals. *Magnetic Engineering and Manufacturing Co.* v. *Dings Mfg. Co.*, 178 F. (2d) 866, 869 (C.A. 2). However, as the rule is now applied in the Second Circuit, an order granting a transfer to a District Court in another Circuit will be reviewed on mandamus if it is alleged that the District Court was without power to act so that its order would be a nullity; but if no more than an abuse of discretion is alleged a petition for mandamus will be entertained only if the transfer is denied and not if it is granted. In the latter case, application must be made to the Court of Appeals of the transferee circuit (which, if it were the Court of Appeals for the First or Third Circuit would, as we have seen, decline to entertain the petition). *Arrowhead Co., Inc.* v. *The Aimee Lykes, et al.*, 193 F. (2d) 83 (C.A. 2); *Anthony* v. *Kaufman*, 193 F. (2d) 85 (C. A. 2), certiorari denied, 342 U.S. 955.[8] Mandamus is available in the Court

[8] Judge Swann is of the view that a Court of Appeals lacks power to grant mandamus to review an order denying transfer under Section 1404(a). Dissent in *Ford Motor Co.* v. *Ryan*, 182 F. (2d) 329, 332 (C.A. 2) certiorari denied, 340 U.S. 851. Early decisions of the Court of Appeals for the Second Circuit are collected and discussed by the Honorable Irving R. Kaufman, *Observations on Transfers Under Section 1404 (a) of the New Judicial Code*, 10 F.R.D. 595, 595-598.

of Appeals for the District of Columbia to review an order directing transfer where that order is based upon an erroneous interpretation of the criteria established by the statute; but it is not clear whether the determination of the District Court on the facts would be reviewed, or whether mandamus would ever be available in this Circuit where the transfer is denied. *Wiren* v. *Laws*, 194 F. 2d 873 (C.A.D.C.), certiorari denied 346 U.S. 938. The same is true of the Fifth Circuit. *In re Atlantic Coast Line R. Co.*, 185 F. (2d) 766 (C.A. 5). In the Sixth Circuit petitions for mandamus have been entertained both where the transfer was granted below, and where it was denied; and that Court will examine the record for an "apparent" abuse of discretion below in evaluating conflicting factual considerations. *Sun Oil Co.* v. *Lederle*, 199 F. (2d) 423 (C. A. 6); *Nicol* v. *Koscinski*, 188 F. (2d) 537 (C. A. 6).

Litigants in identical situations are thus faced with a wide variety of possible results both as to the availability of mandamus and as to the scope of review on the petition, depending upon the circuit in which the case is pending.[9] Such a lack of uniformity in the law applied to various litigants in the federal courts is unseemly and unjust, and should be resolved by this Court. As we have seen, the course of proceedings below in the instant case was such that these basic conflicts would be necessarily resolved either directly or in principle in any review of the present case by this Court.

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[9] Moreover, there seems to be a lack of uniformity in the same circuit; for example, the Seventh Circuit, in a recent case involving a petition for mandamus against the same Judge Igoe, who had granted a stay of proceedings, said that if the reasoning of those who sought mandamus was applied, "then every interlocutory order which is wrong might be reviewed under the All Writs Act. The office of a writ of mandamus would be enlarged to actually control the decision of the trial court rather than used in its traditional function of confining a court to its prescribed jurisdiction." *Radio Corporation of America* v. *Igoe*, 217 F. (2d) 218, 221.

Conflict With Decisions of This Court

This Court has twice reserved the question of whether mandamus is an appropriate remedy to review the decision of a district court on a motion for transfer under Section 1404 (a). *Norwood* v. *Kirkpatrick*, October Term 1954, decided April 11, 1955, 99 L. Ed. 461, 463; *Ex Parte Collett*, 337 U. S. 55, 72.

The decision below, and those with which it is in accord, that the writ will lie, conflict in principle with prior decisions of this Court.

The Courts of Appeal are authorized by the terms of the All Writs Statute (28 U.S.C. 1651 (a)) to issue writs of mandamus only "in aid of their respective jurisdiction," and since their jurisdiction is exclusively appellate they may issue the writ only in aid of that appellate jurisdiction. *Roche* v. *Evaporated Milk Association*, 319 U.S. 21, 25. The petitioner's order denying transfer imposed no bar or obstruction to ultimate appellate review by the court below, and it is difficult to conceive how its writ of mandamus directing that the cause be transferred to a district court in the Eighth Circuit could be "in aid" of the appellate jurisdiction of the Court of Appeals of the Seventh Circuit.

As we have noted, the consequence of the decision below is to permit interlocutory review by mandamus of a concededly non-appealable order. This result is contrary to the historic policy of Congress and of this Court to prevent piecemeal reviews of a single controversy, which can only result in "enfeebling judicial administration." *Cobbledick* v. *United States*, 309 U.S. 323, 325-326. To this end Congress has expressly confined the Courts of Appeal to the review of "final decisions of the district courts" (28 U.S.C. 1291), with certain specific exceptions, not including the order denying transfer which was reviewed on mandamus here (28 U.S.C. 1292). This Court has repeatedly rejected efforts to fritter away this basic policy through the use of writs of mandamus: "Least of all, can

a writ of mandamus be granted to review a ruling or interlocutory order made in the progress of a cause: for, as observed by Chief Justice Marshall, to do this 'would be a plain evasion of the provision of the act of Congress that final judgments only should be brought before this court for reexamination;' * * * and 'would subvert our whole system of jurisprudence.'" *American Construction Co.* v. *Jacksonville, Tampa & Key West Ry. Co.*, 148 U.S. 372, 379. *Bankers Life & Casualty Company* v. *Holland*, 346 U.S. 379, 383; *Roche* v. *Evaporated Milk Assn.*, 319 U.S. 21, 30-31; *In Re Wagner*, 249 U.S. 465, 471; *Ex Parte Newman*, 14 Wall. 152, 165-166, 169.

Even assuming[10] that the Courts of Appeal possess a power comparable to that of this Court, to expedite the review of interlocutory decisions in proper cases in the exercise of a general appellate supervision of inferior federal courts, the use of the extraordinary writs for this purpose is confined to truly exceptional cases.[11] There is nothing exceptional about the present case; and nothing to the contrary was suggested below. The asserted power to issue the writ was based upon the inadequacy of ultimate appeal from orders denying transfers under Section 1404 (a) *as a class*. If the decision below stands, every lower court ruling on a motion of this class will be reviewable on a petition for the extraordinary writ. That review will examine the record for errors of law, or "abuse of discretion" in judgments of fact—precisely the scope of review if the order were directly appealable by statute. The effect is precisely as if Section 1292 were amended to add orders denying transfer to the listed classes of interlocutory orders which are subject to direct appeal.

If, as the court below held, the absence of an effective appeal were itself enough to justify use of the writ, the rule of finality expressed in Section 1291 would be meaningless. Lack of an effective appeal is a prerequisite to the

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[10] Cf. *In Re Josephson*, 218 F. (2d) 174, 177-180 (C.A. 1).

[11] *Ex Parte Peru*, 318 U.S. 578, 584-587.

issuance of the extraordinary writs, but it is not a reason for their use. If this were not true the statutory prohibition of piecemeal appeals would create the basis for the very interlocutory review which it was the purpose of the statute to prevent. "Mandamus will not lie, it is true, when the party may have an appeal or writ of error, but it is equally true that it will not lie in many other cases where the party is without remedy by appeal or writ of error." *Ex Parte Newman*, 14 Wall. 152. The inconvenience and expense that a litigant may suffer as a result of delay in appellate review until final judgment will not justify interlocutory review by mandamus (*Bankers Life & Casualty Company* v. *Holland*, 346 U.S. 379, 383-384; *Roche* v. *Evaporated Milk Association*, 319 U.S. 21, 30-31), and this is true even though subsequent proceedings may make ultimate review ineffective and though the interlocutory order results in additional costs which the complaining litigant can never recover. *In Re Wagner*, 249 U. S. 465, 471. The injury that a litigant may suffer from the denial of interlocutory review does not arise from a usurpation of judicial power or a refusal to exercise it which a writ of mandamus could correct; it results from the statutory prohibition against interlocutory appeals based upon a legislative decision that this harm is less, overall, than that which results from the delay and expense of repeated journeys through the appellate process.

The ruling below not only subverts the statutory and judicial policy against interlocutory reviews, but threatens the usefulness of Section 1404 (a) itself. Judge Goodrich, speaking for an *en banc* court including Judge Maris who served as Chairman of Judicial Conference Committee on the revision of the Judicial Code, has pointed out:[12]

> The second danger which threatens the usefulness of Section 1404 (a) comes from the appellate courts. It is settled in this Circuit and elsewhere that an order

[12] *All States Freight* v. *Modarelli*, 196 F. (2d) 1010, 1011-1012 (C.A. 3).

either making a transfer or refusing a transfer is not appealable. Now the effort is being made both in this court and elsewhere to substitute for appeal a review by mandamus whenever the losing party on a motion to transfer wants an advance review of the ruling on this point.

We think that this practice will defeat the object of the statute. Instead of making the business of the courts easier, quicker and less expensive, we now have the merits of the litigation postponed while appellate courts review the question where a case may be tried.

Every litigant against whom the transfer issue is decided naturally thinks the judge was wrong. It is likely that in some cases an appellate court would think so, too. But the risk of a party being injured either by the granting or refusal of a transfer order is, we think, much less than the certainty of harm through delay and additional expense if these orders are to be subjected to interlocutory review by mandamus.

The ruling below is in conflict with the decisions of this Court defining the permissible uses of a writ of mandamus. This Court has repeatedly held that the writ will issue only to confine an inferior court to its lawful jurisdiction, or to require a lower court to exercise its proper authority when it declines to do so. Where, as in the present case, the district court has neither exceeded its jurisdiction nor declined to exercise it, mandamus will not lie to provide a piecemeal review of the lower court's interlocutory action, and this is true though its decision may have been in error either in law or in fact. *Bankers Life & Casualty Company* v. *Holland*, 346 U.S. 379, 382-383, *Roche* v. *Evaporated Milk Association*, 319 U.S. 21, 25-26. Prior holdings of this Court thus required the denial of the first petition for mandamus in the present case as well as the second, for even if Judge Igoe's initial order involved an error of law, which we do not concede,[13] it was an error committed

[13] The record discloses that Judge Igoe gave weight to the relative availability of speedy transportation and that his statement relating to the removal of the case from a state to a Federal court was merely a passing observation. (App.).

in the exercise of admitted jurisdiction over both the parties and the subject matter. If interlocutory review of such alleged errors is to be had, it should come by way of legislative change in the statutory prohibition against interlocutory review; and not by the use of the extraordinary writs.

Section 1404 (a) provides that the district court "may" transfer a cause under the circumstances stipulated in the statute. This Court has recently held that the discretion thus vested in the district court is broader than that exercised in determining a motion based on the doctrine of forum non conveniens. *Norwood* v. *Kirkpatrick*, No. 337, October Term, 1954, decided April 11, 1955, 99 L. Ed. 461, 463. On the second petition for mandamus in the present case, the court below reviewed the factual judgment arrived at by Judge Igoe and the action taken by him in the exercise of this broad discretion, and issued a writ directing that he vacate his order denying transfer, and enter an order transferring the action. This decision of the court below is in conflict with the repeated rulings of this Court that a judicial act performed in the exercise of a court's discretion will not be reviewed on petition for mandamus, and that the writ will never issue directing the manner in which a court should exercise the judicial discretion vested in it. Mandamus cannot be used, as it was in the instant case, "to compel adjudication in a particular way." *Interstate Commerce Commission* v. *United States*, 289 U.S. 385, 394. *Ex Parte Newman*, 14 Wall. 152, 165-166; *In Re Pollitz*, 206 U.S. 323, 331. For an appellate court to intervene by writ of mandamus in these circumstances is simply to usurp the function of the district court and exercise the discretion vested in it by the statute. "The office of a writ of mandamus would be enlarged to actually control the decision of the trial court rather than used in its traditional function of confining a court to its prescribed jurisdiction." *Bankers Life & Casualty Company* v. *Holland*, 346 U.S. 379, 383. The Court of Appeals, on the second petition,

usurped the function of the district court, an action which it had previously said it would not take. (App. 24a)

If an "abuse of discretion" were ever reviewable on writ of mandamus,[14] the standards applied by the court below in making this review in the present case would be improper. The court below undertook to "balance" the various factors bearing upon the propriety of transfer, giving "paramount" consideration to the "interests of justice," and "minimal value" to plaintiff's right to select her forum, and issued the writ on the basis of its conclusion that the denial of the motion to transfer was an "abuse of discretion" defined as a "clearly erroneous" factual judgment. There is no basis in the statute for the assignment of paramount weight to the "interest of justice" factor; and the assignment of "minimal value" to plaintiff's choice of forum is contrary to the decisions of this Court.[15] Most important, however, mandamus cannot, consistently with the decisions of this Court, be issued simply because the appellate court concludes that the district court's judgment on conflicting facts was "clearly erroneous." These words are customarily taken to mean no more than that the reviewing court "is left with the definite and firm conviction that a mistake has been committed." *United States* v. *Oregon State Medical Society*, 343 U.S. 326, 339. Review on mandamus based upon such a standard is inconsistent with the principles governing this writ discussed above, as well as with the intention of this statute to vest

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[14] This Court has stated in dicta that a writ of mandamus might issue where there was a clear abuse of discretion by the court below, (*Bankers Life & Casualty* v. *Holland*, 346 U.S. 379, 383) but, as demonstrated in the body, the actual holdings of this Court have been consistently to the contrary.

[15] *Norwood* v. *Kirkpatrick*, No. 337, October Term 1954, decided April 11, 1955, 99 L. ed. 461, may have diminished the weight required to be given plaintiffs' selection under the decisions in *Gulf Oil Corporation* v. *Gilbert*, 330 U.S. 501, 508, and *Koster* v. *Lumberman's Mutual Casualty Company*, 330 U.S. 518, 524, but it has not reduced it to a "minimal" consideration. See page 463, of 99 L. Ed.

a broad discretion in the district court. *Norwood* v. *Kirkpatrick*, No. 337, October Term 1954, decided April 11, 1955, 99 L. ed. 461. In the present case, there was a direct and substantial conflict of fact as to whether trial in one or the other of the competing jurisdictions would best serve the convenience of witnesses and parties and the interests of justice. It is impossible to read this record without concluding that the line between an "erroneous" decision and what the court below thought to be a "clearly erroneous" one, is insufficient to prevent a Court of Appeals from simply substituting its judgment and discretion for that of the district court.

CONCLUSION

It is respectfully submitted that because of the importance of the question, and the existing conflicts among the circuits and with the prior decisions of this Court, this petition for a writ of certiorari should be granted.

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IN THE UNITED STATES DISTRICT COURT.

For the Northern District of Illinois,
Eastern Division.

No. 52 C 2124.

CLAUDINE M. MIKESELL, Administrator of the Estate of Charles Delbert Mikesell, Deceased, *Plaintiff*,

v.

CHICAGO, ROCK ISLAND AND PACIFIC RAILROAD COMPANY, a Corporation, *Defendant*.

Motion by Defendant to Transfer.

Comes now Chicago, Rock Island and Pacific Railroad Company, defendant in the above entitled action, and moves the Court to enter an order in this action, under Section 1404(a) of Title 28 of the U. S. Code, transferring said action to either the United States District Court for the Southern District of Iowa, Central Division, sitting at Des Moines, Iowa, or to the United States District Court for the Southern District of Iowa, Western Division, sitting at Council Bluffs, Iowa, where this action might have been brought, for the following reasons:

1. For the convenience of the parties and witnesses;

2. In the interest of justice;

3. To compel the defendant to defend this action in the United States District Court for the Northern District of Illinois, Eastern Division, would impose an unreasonable and unlawful burden upon interstate commerce;

4. It is against the public policy of the State of Illinois, within which this Court sits, to adjudicate causes of action for death where, as here, death occurs outside of this state and where a right of action for such death exists under the laws of the place where such death occurred and service of process in such suit may be had upon the defendant in

such place (Ch. 70, Injuries, Smith-Hurd Illinois Annotated Statutes, Section 2).

In support of this motion, defendant submits the attached affidavit of George E. Johnson, which affidavit is attached hereto and made a part hereof.

/s/ THOMAS I. MEGAN,
/s/ MILTON V. THOMPSON,
Attorneys for Defendant,
1025 La Salle Street Station,
WAbash 2-3200.

[Verification omitted]

IN THE UNITED STATES DISTRICT COURT.

For the Northern District of Illinois,
Eastern Division.

No. 52 C 2124.

CLAUDINE M. MIKESELL, Administrator of the Estate of Charles Delbert Mikesell, Deceased, *Plaintiff*,

v.

CHICAGO, ROCK ISLAND AND PACIFIC RAILROAD COMPANY, a Corporation, *Defendant*.

State of Illinois, County of Cook. ss.

Affidavit in Support of Motion to Transfer.

George E. Johnson, of lawful age, being first duly sworn upon his oath, states that since July 1, 1951, he has been and now is the Assistant General Claim Agent for the defendant herein; that he is authorized to and does make this affidavit for and in its behalf; that at his direction and under his supervision defendant's Claim Department has made an investigation of the facts pertaining to the issues in this case; and that the facts herein set forth are based upon said investigation and are true to the best of affiant's knowledge and belief:

1. The alleged accident occurred in the Village of Avoca, County of Pottawattamie, State of Iowa, on or about September 14, 1951.

2. Plaintiff at the time of the alleged accident and since said time as continuously resided at Des Moines, County of Polk, State of Iowa.

3. Plaintiff's decedent at the time of the alleged accident resided at Des Moines, County of Polk, State of Iowa.

4. According to plaintiff's complaint, her alleged right to sue herein is evidenced by Letters of Administration issued by the District Court of Polk County, State of Iowa.

5. The presence and testimony of the following witnesses, all of whom have personal knowledge of the facts material to any such contested issues, will be essential to the defense of this case:

(a) Two witnesses residing at Des Moines, Iowa.
(b) Six witnesses residing at Avoca, Iowa.

6. None of the witnesses designated in Paragraph 5 are employed by defendant or have any affiliation or connection whatsoever with defendant.

7. In addition to the witnesses set forth in Paragraph 5, the presence and testimony of at least five employees of defendant, all of whom have personal knowledge of material facts, will be essential to the defense of this case.

8. The witnesses designated in Paragraph 7 hereof reside within the territorial limits of the United States District Court for the Southern District of Iowa, in or near Des Moines, Iowa and Avoca, Iowa.

9. All of the witnesses referred to in Paragraphs 5 and 7 hereof reside in or near Des Moines, Iowa and Avoca, Iowa, all of which localities are within the range of legal process issued from and by the United States District Court for the Southern District of Iowa.

10. The testimony of all the witnesses designated in Paragraph 5 hereof can be obtained only by subpoena, and the legal process of the United States District Court for the Northern District of Illinois does not extend to any of the localities where these witnesses reside.

11. The shortest distance by rail from Des Moines, Iowa to Chicago, Illinois is 358 miles.

12. The shortest distance by rail from Avoca, Iowa to Chicago, Illinois is 459 miles.

13. The minimum loss of time for each witness attending a trial of this case in this Court will be five days, and the necessary expenses for transportation, maintenance,

and loss of time of such witnesses as would voluntarily travel to Chicago to testify on defendant's behalf would aggregate a substantial sum of money.

14. There will be no facts to be proved by any party by witnesses residing in or near Chicago, Illinois.

15. Defendant cannot adequately present its defense to plaintiff's claim at a trial of this cause in Chicago, because:

(a) Defendant cannot compel the attendance of non-employee witnesses at the trial and it will be unable to persuade the majority of said witnesses to voluntarily appear.

(b) Defendant cannot present the testimony of its employee witnesses at a trial in Chicago because most of them are important operating men of defendant railroad and cannot be separated from their regular employment for sufficient time to attend this trial.

(c) It would be impossible for defendant to adequately and properly present its defense by depositions and it cannot in advance anticipate evidence which may be offered by plaintiff.

16. Any witnesses produced by plaintiff upon any disputed issue would necessarily be located in or near Des Moines, Iowa and Avoca, Iowa, and within the range of legal process issued by the United States District Court for the Southern District of Iowa.

17. A trial of this action in this Court would be excessively costly to defendant when compared to a trial at either Des Moines, Iowa or Council Bluffs, Iowa.

18. If the witnesses employed by defendant were absent from their employment for the time necessary to attend the trial of this cause in Chicago, interruption, confusion, and delay in defendant's handling of its interstate business would result.

19. Defendant is suable in both the United States District Court, for the Southern District of Iowa, Central Division and the United States District Court for the Southern District of Iowa, Western Division. This action might have been brought in either of said Courts and the transfer thereof to either of said Courts would serve the convenience of the parties and witnesses, and be in the interest of justice.

/s/ George E. Johnson.

[Verification omitted]

IN THE DISTRICT COURT OF THE UNITED STATES

For the Northern District of Illinois,
Eastern Division.

No. 52 C 2124.

CLAUDINE M. MIKESELL, Administrator of the Estate of Charles Delbert Mikesell, Deceased, *Plaintiff*,

v.

CHICAGO, ROCK ISLAND AND PACIFIC RAILROAD COMPANY, a Corporation, *Defendant*.

Objections to Defendant's Motion to Transfer Cause Under Provisions of 28 USCA Section 1404-A and Suggestions in Support Thereof.

Now comes the Plaintiff, Claude M. Mikesell, Administrator of the Estate of Charles Delbert Mikesell, Deceased, by James A. Dooley, her attorney, objecting to the Motion of Defendant to transfer this cause to the United States District Court for the Southern District of Iowa, Central Division, or to the United States District Court for the Southern District of Iowa, Western Division, and shows unto the court as follows:

1. That the plaintiff, a resident of Des Moines, Iowa, filed this suit on September 13, 1952, in the Superior Court of Cook County, Illinois, against the defendant railroad for injuries resulting in the death of her husband, Charles Delbert Mikesell on September 14, 1951. On October 6, 1952, this suit was transferred to this court on defendant's motion, based on the diversity of citizenship provision of the Federal Statutes.

2. That the defendant railroad is a Delaware corporation engaged as a common carrier of passenger and freight for hire throughout several states of the country; that it maintains its principal place of business, including executive and general offices and a central claim department out of which all litigation is handled at 139 West Van Buren

Street, Chicago, Illinois; that it likewise maintains a legal department at the same address and this legal department is currently engaged in handling personal injury and death actions, such as the accident out of which this present suit arises; and furthermore that the said defendant employs many hundreds of people who are residents of the City of Chicago.

3. That defendant desires to transfer her cause either to Des Moines, Iowa, or to Council Bluffs, Iowa; that this accident happened in Avoca, Iowa, and that between Avoca, Iowa, and Des Moines, Iowa, there is but one train leaving Avoca at 8:44 P. M. and arriving at Des Moines, Iowa, at 11:00 P. M., and further that as will hereinafter appear, one can travel from Des Moines to Chicago, Illinois, on defendant's road within six hours on one of its four daily trains which maintain the following schedules:

Leaving Des Moines	Arriving Chicago
7:15 A. M.	12:45 P. M.
2:15 P. M.	8:30 P. M.
11:30 P. M.	7:05 A. M.
2:46 A. M.	8:50 A. M.

That between Council Bluffs, Iowa, and Des Moines, Iowa, the transportation is not as good as that between Des Moines and Chicago, with the trains running on the following schedules:

Leaving Council Bluffs	Arriving Des Moines
12:10 P. M.	2:36 A. M.
11:47 A. M.	2:10 P. M.
7:55 P. M.	11:00 P. M.

That Council Bluffs, Iowa, is 107 miles from Des Moines, Iowa, and it would be just as difficult for the plaintiff to try her cause in Council Bluffs, Iowa, as in Chicago.

4. That Des Moines, Iowa, the other center to which the defendant seeks to transfer this cause is the second largest insurance city in the United States, being exceeded only by Hartford, Connecticut, in the number of companies which have its principal offices within its confines; and that within said city, the following insurance companies have their offices listed, many of which are their principal offices:

Acme General Agency
Aetna Insurance Company
Aetna Life Affiliated Companies
Aetna Life Insurance Company
Agricultural Mutual Insurance Ass'n
Albany Insurance Company of New York
Allied Mutual Casualty
Allstate Automobile Insurance Co.
Allstate Insurance So.
America Fire Automobile
America Fire Ins. Group
American-Associated Insurance Companies
American Automobile Fire Ins. Co.
American Automobile Ins. Co.
American Eagle Fire Ins. Co.
American Farmers Mutual Automobile Ins. Ass'n
American Farmers Mutual Casualty Co.
American Farmers Mutual Ins. Co.
American Farmers Mutual Life Ins. Co.
American Insurance Group
American Mutual Ins. Co.
American Mutual Liability Ins.
American Mutual Life Ins. Co.
American National Ins. Co.
American Republic Ins. Co.
Associated Indemnity Corp.
Atlas Assurance Co. Ltd.
Bankers Life & Casualty Co.
Bankers Life Co., Des Moines

Berkshire Life Ins. Co.
Birmingham Fire Ins. Co.
Bituminous Casualty Corp.
Central Ins. Agency
Central Life Assurance Co.
Central Standard Life of Chicago
Equitable Life Assurance Society of the U. S.
Citizens Ins. Co.
Columbia Casualty Co.
Columbia National Life Ins. Co.
Combined Casualty Co.
Combined Ins. Co. of America
Commerce Ins. Co.
Connecticut Gen. Life Ins. Co.
Connecticut Indemnity Co.
Connecticut Mutual Life Ins. Co.
Continental Casualty Co.
Continental Fire Ins. Co.
Des Moines Casualty Co.
Dubuque Fire & Marine Ins. Co.
Employers Mutual Casualty Co.
Employers Mutual Casualty Insurance
Employers Mutual Liability Ins. Co. of Wisc.
Employers Mutual of Wausau
Employers Mutual Fire Ins. Co.
Equitable Life Assurance Society of U. S.
Equitable Life Ins. of Iowa
Farm & City Mutual Ins. Ass'n of Iowa
Farmers Casualty Co.
Farmers Elevator Mutual Casualty Co.
Farmers Elevator Mutual Ins. Co.
Farmers Ins. Group
Farmers Life Ins. Group
Farmers Mutual Fire Ins. Ass'n
Farmers Mutual Hail Ins. Co.
Farmers Mutual of Madison, Wisc.
Federated Mutual

Federated Mutual Implement & Hdwe. Ins. Co.
Fidelity & Casualty Co. of New York
Fidelity-Phenix Ins. Co.
Financial Credit System
Fireman's Friend Ins. Co. Group
Franklin Life Ins. Co.
Freeport Motor Casualty Ins. Co.
General American Companies
General American Life Ins. Co.
General Casualty Co. of Wisc.
General Mortgage Corp. of Iowa
Glens Falls Ins. Co.
Globe Indemnity Co.
Great American Group of Ins. Cos.
Great Central Ins. Co.
Hartford Accident & Indemnity Co.
Hartford Fire Ins. Co.
Hawkeye-Security Ins. Co.
Home Indemnity Co.
Home Ins. Co.
Home Ins. Co. of N. Y.
Homesteaders Life Co.
Indemnity Ins. Co. of No. Am.
Industrial Ins. Co.
Industrial Co. of No. Am.
Inter-State Assurance Co.
Inter-State Finance Corp.
Iowa Farm Mutual Ins. Co.
Iowa Home Mutual Casualty Co.
Iowa Home Mutual Fire Ins. Co.
Iowa Mutual Hail Ins. Co.
Iowa Mutual Tornado Ins. Ass'n
Iowa National Mutual Ins.
Iowa State Traveling Men's Ass'n
John Hancock Mutual Ins. Co.
John Hancock Mutual Life Ins. Co.
Kansas City Fire & Marine Ins.

Kansas City Life Ins.
Liberty Mutual Ins.
Lincoln Liberty Life Ins. Co.
Lincoln National Life Ins. Co.
Loyalty Group
Manufacturers Casualty Ins. Co.
Maryland Casualty Co.
Mass. Mutual Life Ins. Co.
Mass. Protective Cos.
Medical Protection Ins. of Ft. Wayne
Mercury Ins. Co.
Midwest Am. Mutual Ins. Co.
Mill Owners Mutual Ins. Co.
Minn. Mutual Life Ins. Co.
Missouri Ins. Co.
Monarch Life Ins. Co.
Motors Ins. Corp.
Mutual Benefit Health & Accident Ass'n
Mutual Benefit Life Ins. of Newark
Mutual Life Ins. Co. of N. Y.
National Benefit Ins. Co.
National Casualty Co.
National of Hartford Group
National Life Co.
National Reserve Life Ins.
National Surety Corp.
National Travelers Ins. Co.
National Union Fire Ins. Co.
New England Mutual Life Ins. Co.
New York Life Ins. Co.
New York Underwriters Co.
Newark Ins. Co.
Niagara Fire Ins. Co.
North America Companies
North America Accident Ins. Co.
North America Life & Casualty Co.
North British & Mercantile Ins. Group

North River Ins. Co.
North Casualty Co. Mutual
North Life Ins. Co.
Northwestern Mut. Life Ins. Co.
Northwestern Nat'l Life Ins.
Occidental Life Ins. Co. of Calif.
Ocean Acc. & Guaranty Corp.
Ohio Casualty Ins. Co.
Ohio Farmers Ins. Co.
Ohio National Life Ins. Co.
Pacific Mutual Life Ins. Co.
Pacific National Fire Ins. Co.
Paramount Fire Ins. Co.
Patriotic Ins. Co. of America
Paul Revere Life Ins. Co.
Penn Mutual Life Ins. Co.
Peoples Life Ins. Co. of Indiana
Phoenix Mutual Life Ins. Co. of Hartford, Conn.
Pioneer Mutual Life Ins. Co.
Pioneer National Casualty Co.
Preferred Risk Mutual Ins.
Providence, Wash. Ins. Co.
Providence Mutual Life Ins. Co. of Phil.
Prudential Ins. Co. of No. America
Royal Indemnity Group
Royal-Liverpool Group
St. Paul Fire & Marine Ins. Co.
St. Paul Mercury Indemnity Co.
Scandia Mut. Ins. Ass'n
Security Ins. Co. of New Haven
Springfield Fire & Marine Ins. Co.
Square Deal Ins. Co.
State Automobile Ins. Ass'n
State Farm Ins.
Sun Indemnity Co. of N. Y.
Term Mut. Dwelling Ins.
Travelers Ins. Co. Hartford, Conn.

Union Fire Ins. Co.
United Benefit Fire Ins. Co.
United Benefit Life Ins. Co.
U. S. Fidelity & Guaranty Co.
U. S. Fire Ins. Co.
Washington Nat'l Ins. Co.
Webster Life Ins. Co.
Westchester Fire Ins. Co.
Western Mutual Ins.
Wolverine Ins. Co.
World Agency Inc.
World Ins. Co.

5. That many of the said companies write casualty insurance and many of their employees would be available for and subject to jury service, if this cause were tried in Des Moines, Iowa; that it is a common fact among lawyers who prosecute and defend suits for damages that employees of insurance companies are favorable to the defendant and that the plaintiff, having only three peremptory challenges, would not obtain a trial in an impartial atmosphere, such as is afforded by this District.

6. That the plaintiff realizes that she has the burden of proving her case by a preponderance of the evidence and accordingly it will be incumbent upon her to have witnesses testify either in person or by way of deposition; that if the cause were tried at Council Bluffs, Iowa, it would be just as difficult for her to obtain the testimony of witnesses who are residents of Iowa.

7. That she has retained an attorney, who is a resident of Cook County, Illinois, and who, to date, has conducted an extensive investigation of facts and circumstances surrounding this accident, in addition to legal services performed; further that she is a widow of moderate means and if this case were to be transferred, she would be required to hire an attorney in Iowa and be put to added expense

and inconvenience, all of which would prove a real burden and hardship in her attempt to prosecute this claim.

8. That the defendant by this motion does not seek to further the ends of justice, which is the purpose of 1404(a); it seeks to choose a forum more favorable to its side of the case.

Wherefore, the plaintiff moves the Court to deny the defendant's motion to transfer this cause under the provisions of 28 U. S. C. A. Section 1404-A to the United States District Court for the Southern District of Iowa, Central Division, or to the United States District Court for the Southern District of Iowa, Western Division.

.....

[Verification omitted]

UNITED STATES DISTRICT COURT
OFFICE OF THE CLERK

UNITED STATES COURT HOUSE
CHICAGO 4

Date: 7-1-53

Re: Mikesell, etc., vs. C.R. I. & P. R. Co.
Case No. 52 C 2124

You are hereby notified that Judge Igoe entered the following order on 6-30-53:

Defts. motion to transfer cs. to the Southern District of Iowa is overld.

ROY H. JOHNSON,
Clerk

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 10940.

October Term, 1953, April Session, 1954.

On Petition for a Writ of Mandamus.

CHICAGO, ROCK ISLAND AND PACIFIC RAILROAD COMPANY, a corporation, *Petitioner*,

v.

HONORABLE MICHAEL L. IGOE, Judge of the United States District Court for the Northern District of Illinois, Eastern Division, *Respondent*.

April 20, 1954.

Before MAJOR, *Chief Judge*, LINDLEY and SCHNACKENBERG, *Circuit Judges*.

LINDLEY, *Circuit Judge*. This is a petition for a writ of mandamus to compel the respondent to transfer, pursuant to the provisions of 28 U. S. C. Sec. 1404 (a), the cause entitled *Mikesell, Etc.* v. *Chicago, R. I. & P. R. Co.*, Civil No. 52 C 2124, from the District Court for the Northern District of Illinois to the District Court for the Southern District of Iowa.

Plaintiff in that cause, administratrix for the estate of Charles Mikesell, deceased, whose counsel appears here for respondent, filed a complaint in the Superior Court of Cook County, Illinois, against petitioner to recover damages claimed to have grown out of the allegedly wrongful death of plaintiff's decedent in a crossing accident in Avoca, Iowa. Plaintiff averred that the decedent had been killed in a collision between a train operated by petitioner and an automobile driven by the decedent, as the proximate result of negligence on the part of the railroad company.

On motion of petitioner, a Delaware corporation, averring plaintiff's Iowa citizenship, the cause was removed to the United States District Court for the Northern District

of Illinois. Thereafter petitioner filed a motion under 28 U. S. C. Sec. 1404 (a)[1] to transfer the cause to the United States District Court for the Southern District of Iowa, for trial in either its Central Division sitting at Des Moines or its Western Division sitting at Council Bluffs.

This motion was supported by the affidavit of petitioner's assistant general claim agent to the effect that plaintiff is a resident of Des Moines, Iowa,[2] in the Southern District of Iowa; that the accident occurred at Avoca, Iowa; that all witnesses to be called by petitioner reside at either Des Moines or Avoca; that a trial in the Northern District of Illinois would effectually deprive petitioner of process to compel the attendance of witnesses; that Avoca is 459 miles from Chicago, but only some 100 miles from Des Moines; that a trial at Chicago would necessarily impose excessive expense upon petitioner in procuring witnesses to go there to testify; that each of such witnesses would lose some five days; that petitioner's defense cannot be appropriately presented by deposition; that any witnesses to be called by plaintiff on any disputed issue are necessarily

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[1] "For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought." 28 U.S.C. Sec. 1404 (a).

Whether to transfer a cause under this section rests in the sound discretion of the trial court. Also this section presupposes two jurisdictions in which venue may be laid. *Foster-Milburn Co.* v. *Knight*, 181 F. 2d 949 (CA-2).

[2] Respondent's answer to the petition avers that plaintiff, prior to June 30, 1953, the date petitioner's motion was denied, had moved to and was a resident of the Northern District of Illinois, and on the basis of this averment denies the allegation of the petition that all witnesses to be called by either party are residents of the Southern District of Iowa. It was conceded on oral argument that plaintiff was not a witness to the accident which caused the death of her decedent. On November 30, 1953, over petitioner's objection, respondent granted a motion that a statement as to this change of residence be certified to this court. Inasmuch as that fact was not before respondent when he denied petitioner's motion to transfer, it is not properly before us now and we do not consider it. *General Portland Cement Co.* v. *Perry*, 204 F. 2d 316 (CA-7).

resident in or near either Des Moines or Avoca, and that petitioner is amenable to process in both the Central and Western Divisions of the District Court for the Southern District of Iowa.

Plaintiff objected to the motion, averring, in an affidavit, that plaintiff is a resident of Des Moines; that the suit was removed from the Superior Court of Cook County, Illinois, to the federal court on petitioner's motion; that petitioner is a Delaware corporation and maintains its principal offices in Chicago; that better train service is provided between Chicago and Des Moines than between Des Moines and Council Bluffs; that Des Moines is the second largest insurance center in the nation; that if the cause were tried at Council Bluffs it would be equally difficult for plaintiff to obtain the testimony of her witnesses who are residents of Iowa; that plaintiff is represented by Chicago counsel, and that petitioner seeks, by its motion to transfer, a forum more favorable to its cause.

Petitioner's motion was denied on grounds subsequently stated, and we granted leave to file this petition for a writ of mandamus. Respondent answered, denying the power of this court to entertain the petition in a case of this nature. Stated in the light most favorable to respondent, the contention is that the granting or denial of a motion to transfer under 28 U. S. C. Sec. 1404 (a) rests within the sound discretion of the trial court, and that mandamus will not lie to review its disposition. This is the question with which we are principally concerned and which, if respondent's position be sound, disposes of the proceeding.

This question has not been considered by this court previously. A majority of the decisions from other circuits hold that mandamus will lie in a situation such as this, although certain apparent conflicts arise because of the frequent failure of the opinions lucidly to distinguish between the naked question of power to issue and the broader question of whether, on the merits, the writ should issue

in a particular case. See, *e. g.*, *All States Freight* v. *Modarelli*, 196 F. 2d 1010 (CA-3).

The courts for the Second, Third, Fifth, Ninth and District of Columbia Circuits have held that mandamus will lie, *Paramount Pictures* v. *Rodney*, 186 F. 2d 111, cert. denied 340 U. S. 953 (CA-3); *Ford Motor Co.* v. *Ryan*, 182 F. 2d 329, cert. denied 340 U. S. 851 (CA-2); *Wiren* v. *Laws*, 194 F. 2d 873 (CA-DC); *Atlantic Coast Line R. Co.* v. *Davis*, 185 F. 2d 766 (CA-5); *Shapiro* v. *Bonanza Hotel Co.*, 185 F. 2d 777 (CA-9); and *Foster-Milburn Co.* v *Knight*, 181 F. 2d 949 (CA-2), while the Eighth Circuit alone has held squarely that it will not lie to review a Section 1404 (a) order, *Carr* v. *Donohoe*, 201 F. 2d 426. See also, Swan, *C. J.*, concurring, *Ford Motor Co.* v. *Ryan*, 182 F. 2d 329, 332. See *Hydraulic Press Mfg. Co.* v. *Moore*, 185 F. 2d 800 (CA-8). We think also that tacit recognition of the power of a federal appellate court to entertain such a cause is implicit in *Ex parte Collett*, 337 U. S. 55; *Kilpatrick* v. *Texas & Pacific R. Co.*, 337 U. S. 75; and *United States* v. *Nat. City Lines*, 337 U. S. 78, and, although the jurisdictional issue was not raised, the existence of the mandamus power is of the essence likewise in *Dairy Industries Supply Assn.* v. *La Buy*, 207 F. 2d 554 (CA-7); *C-O-Two Fire Equipment Co.* v. *Barnes*, 194 F. 2d 410, aff'd *Cardox Corp.* v. *C-O-Two Fire Equip. Co.*, 344 U. S. 861 (CA-7); *Fettig Canning Co.* v. *Steckler*, 188 F. 2d 715, cert. denied 347 U. S. 913 (CA-7); *All States Freight* v. *Modarelli*, 196 F. 2d 1010 (CA-3); and *Nicol* v. *Koscinski*, 188 F. 2d 537 (CA-6). We did not reach the question in *General Portland Cement Co.* v. *Perry*, 204 F. 2d 316, and *B. Heller & Co.* v. *Perry*, 201 F. 2d 525. The power of a court of appeals to mandate a district judge in a proper case was recognized in a leading decision rendered prior to the enactment of Section 1404 (a). *Roche* v. *Evaporated Milk Assn.*, 319 U. S. 21. There the court said, at 25-26: "The common law writs, like equitable remedies, may be granted or withheld in the sound discretion of the court. (Citations omitted.) Hence the question presented on this

record is not whether the court below had power to grant the writ but whether in the light of all the circumstances the case was an appropriate one for the exercise of that power."

Respondent's principal reliance on *Bankers Life & Casualty Co.* v. *Holland*, 346 U. S. 379, is misplaced. There the court held that mandamus would not lie to review an order entered under 28 U. S. C. Sec. 1406 (a). Suffice it to say that that Section, unlike Section 1404 (a), deals with a situation of total want of venue and is mandatory. If venue is improper, the district court must either dismiss or transfer the cause to a court in which venue lies. If the court does neither, any judgment entered in the cause is a nullity, an error correctible on appeal.

We find, then, that the authorities are persuasive that we have power to entertain this petition. While a ruling on a motion under Section 1404 (a) to transfer is not an appealable order, *Ford Motor Co.* v. *Ryan, supra; Jiffy Lubricator Co.* v. *Stewart-Warner Corp.*, 177 F. 2d 360 (CA-4), it is the type of order which may, absent the power of this court to correct it in any case, give rise to judicially sanctioned irreparable procedural injury. For example, such was the writ issued in *Atlantic Coast Line R. Co.* v. *Davis, supra,* to correct an erroneous transfer order which the court held to be a "renunciation or abandonment" of jurisdiction which the trial court was bound to exercise. Adoption of respondent's contention would compel us to hold that this court is powerless to correct an error of that nature. In the language of the court for the District of Columbia Circuit, were we "to hold even unauthorized orders of transfer to lie beyond our control, the effect would be to deprive litigants of forums to which they are entitled." *Wiren* v. *Laws, supra* at 874.

A less compelling consideration is likewise persuasive of the existence of power to supervise transfer practice. Thus, we are in accord with Judge Frank's statement in the *Ford Motor* case, *supra* at 330, that this is the "kind of interlocutory order with which this court can properly

deal by way of such a writ, since should petitioners—the defendants—finally lose on the merits below, any error in the interlocutory order would probably be incorrectible on appeal, for petitioners could hardly show that a different result would have been reached had the suit been transferred. Nor, should petitioners win on the merits below, could they collect as costs the additional expenses to them, if any, due to the court's failure to order the transfer. We recognize that the dividing line is by no means entirely clear between the power of this court and its lack of power to issue the writ. But we think this a sufficiently 'extraordinary cause' to empower us to do so, if the district judge erred."

We conclude that we have jurisdiction to review orders relative to transfer under Section 1404 (a) by way of mandamus. However, this opinion deals with the existence of power only, not with the permissible limitations on its exercise. The question of whether we are to adopt Judge Frank's view that the district court's guess should not be disturbed unless "it is too wild", *Ford Motor Co.* v. *Ryan, supra,* or the more stringent rule that a Section 1404 (a) ruling will never be disturbed if it is based on the requisite statutory tests, *All States Freight* v. *Modarelli,* 196 F. 2d 1010 (CA-3), or a rule which permits a wider control over the trial court's discretion is not now before us.

On the merits, the proceeding at bar is strikingly similar to that before this court in *Dairy Industries Supply Assn.* v. *La Buy,* 207 F. 2d 554, wherein, on a petition for a writ of mandamus, we vacated the trial court's order on the ground that it was not based upon consideration of the requisite factors enumerated in Section 1404 (a), namely, the "convenience of the parties and witnesses, in the interest of justice." Here the motion to transfer was denied "on the general proposition that the place where this accident occurred is about as close to Chicago as to Des Moines where you want to have the case tried, and this case was started in the State Court and you folks transferred it over to the Federal Building evidently for the purpose of having

a trial, and as soon as it got here the only trial you wanted was to ship it out to Iowa. I don't think section 1404 (a) was ever established or ever enacted for that reason. * * *"

The fact that the cause is in the district court by removal from a state court has no bearing on a motion to transfer. Once removed, the action proceeds as if it had been brought in the federal court originally. 28 U.S.C. Sec. 81 (c); *Freeman* v. *Bee Machine Co.*, 319 U. S. 448; *Grivas* v. *Parmelee Transp. Co.*, 207 F. 2d 334, cert. denied 347 U. S. 913 (CA-7). It would seem clear, therefore, that respondent "denied the motion upon an asserted legal premise which in fact does not exist." *Grivas* v. *Parmelee, supra* at 338.

Respondent earnestly contends, however, that the order should stand inasmuch as one forum to which transfer is sought is a noted insurance center, and a trial there would be prejudicial to plaintiff. However, neither party to the cause is an insurance company. The averment is wholly irrelevant. Furthermore we can not presume that a trial will proceed other than fairly in any federal forum in which venue exists. The governing tests are expressly stated in the Act, and a leading mandamus case points up the correct guides to their application to a particular fact situation, which include "the relative ease of access to sources of proof; availability of compulsory process for attendance of unwilling, and the cost of obtaining attendance of willing, witnesses; possibility of a view of the premises, if [necessary]; and all other practical problems that make trial of a case easy, expeditious and inexpensive. * * * The court will weigh relative advantages and obstacles to fair trial." *Gulf Oil Corp.* v. *Gilbert*, 330 U. S. 501, 508.

Nothing herein conflicts with or impinges upon our opinion in *Comfort Equipment Company* v. *Steckler*, No. 11072 and *Burch Mfg. Co.* v. *Steckler*, No. 11073, decided April 20, 1954. In those cases, as we pointed out, appeal afforded an adequate remedy for correction of any error committed by the trial court in entering the challenged orders.

We adhere to the *Dairy Industries* decision and remand the cause to the District Court with directions to vacate the order denying the transfer and to reconsider petitioner's motion in the light of the views expressed herein. Ultimate decision on that motion is within the province of the District Court, and we cannot, as petitioner would have us do, usurp its function and decide the question in this court.

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UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

Chicago 10, Illinois

Tuesday, April 20, 1954

Before

HON. J. EARL MAJOR, *Chief Judge*
HON. WALTER C. LINDLEY, *Circuit Judge*
HON. ELMER J. SCHNACKENBERG, *Circuit Judge*

No. 10940

CHICAGO, ROCK ISLAND AND PACIFIC RAILROAD COMPANY, a corporation, *Petitioner*,

v.

HONORABLE MICHAEL L. IGOE, Judge of the United States District Court for the Northern District of Illinois, Eastern Division, *Respondent*.

On Petition for a Writ of Mandamus

This matter comes before the Court on the Petition of Chicago, Rock Island and Pacific Railroad Company, a corporation, for a Writ of Mandamus to direct the Respondent to vacate and set aside an order entered on June 30, 1953 in the case entitled "Claudine M. Mikesell, Administrator of the Estate of Charles Delbert Mikesell, Deceased vs. Chicago, Rock Island and Pacific Railroad Company, Civil Action No. 52-C-2124", the answer of Respondent thereto, and renewed motion to dismiss petition for Writ of Mandamus, and was argued by counsel.

On consideration whereof, it is ordered by the Court that the renewed motion to dismiss petition for Writ of Mandamus be, and the same is hereby, DENIED.

It is further ordered by the Court that this cause be remanded to the United States District Court for the Northern District of Illinois, Eastern Division, with directions to vacate the order of said Court entered on June 30, 1953, denying the transfer, and to reconsider Petitioner's motion in the light of the views expressed in the opinion of this Court filed this day.

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IN THE DISTRICT COURT OF THE UNITED STATES.
FOR THE NORTHERN DISTRICT OF ILLINOIS,
EASTERN DIVISION.

No. 52 C 2124

CLAUDINE M. MIKESELL, Administrator of the Estate of Charles Delbert Mikesell, Deceased, *Plaintiff*,

v.

CHICAGO, ROCK ISLAND AND PACIFIC RAILROAD COMPANY, a Corporation, *Defendant*.

Affidavit.

STATE OF ILLINOIS, }
COUNTY OF COOK. } ss.

Claudine Mikesell Davis, being first duly sworn, deposes and says that she is the same person as Claudine M. Mikesell, who brings this action as the Administrator of the Estate of Charles Delbert Mikesell, Deceased;

That her present address is 351 Elizabeth Drive, Lombard, Illinois, and that she has lived at the foregoing address since somewhere between June 10 and June 15, 1953.

Affiant further states that on May 2, 1953, she was married to M. L. Davis, who was then and is now employed as the National Fleet Sales Manager for the Mack Truck Corporation, 3300 South Wentworth Avenue, Chicago, Illinois.

That about one week prior to her marriage on May 2, 1953, she and the said M. L. Davis had purchased the home at 351 Elizabeth Drive, Lombard, Illinois, and that the title was in joint tenancy from the date of the acquisition of the property; that she and her husband, M. L. Davis, would have removed immediately upon their marriage to their home at Lombard, Illinois, were it not for the fact that her children, Judith Ann, born March 15,

1941, and Pamela, born July 6, 1945, were in school, the term of which would not expire until the early part of June, 1953.

Affiant states that her husband, M. L. Davis, had lived in Lombard, Illinois, at the home of his brother, William Davis, 1815 South Highland Avenue, since March 1953, when he took up residence in this district, having been transferred by his employer from Kansas City to Chicago; that her husband had, prior to the said transfer, lived in Lombard several years and was working in Kansas City from approximately March 1952 to March 1953; that her two children attend the public schools in Lombard, Illinois, and have been enrolled at the said schools since September, 1953;

Affiant states that between May 15, 1953 and May 20, 1953, the said M. L. Davis, a widower, legally adopted her children, namely, Judith Ann and Pamela.

Affiant further states that she is a member of the Parent-Teachers Association of both the Green Valley Grade School and the Lombard Junior High School, wherein her children are enrolled; that both she and her husband are registered voters in DuPage County, Illinois; that she and her husband are possessed of two automobiles, both of which have been in their names jointly since approximately May 10, 1953, and that since approximately June 15, 1953, she and her husband have had, in joint tenancy, a savings account in the Wheaton Federal Savings and Loan, Wheaton, Illinois, and in the Lombard State Bank, Lombard, Illinois.

Affiant further states that since May 2, 1953, she has considered Lombard, Illinois, as her permanent residence and has actually been living at the said address, together with her husband, her husband's child by a prior marriage, Debra Ann, born May 31, 1950, and her two children, since some date between June 10 and June 15, 1953; that her residence at the said address has been continuous and uninterrupted; that the residence of her children, Judith and Pamela, on whose behalf this action is brought, has

likewise been continuous and uninterrupted since the said date.

Affiant further states that her husband, M. L. Davis, is physically unable to make an affidavit as to the facts surrounding their residence, because of an automobile accident on June 16, 1954, which caused him severe injuries, and that as the result of the said injuries he is now confined to the Elmhurst Memorial Hospital.

She further states that because of the injuries sustained, he has great difficulty in talking and can only be seen at short intervals by none other than herself.

Further affiant sayeth not.

* * * * * * * * * *

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Notary Public.

[Verification omitted]

IN THE DISTRICT COURT OF THE UNITED STATES.
FOR THE NORTHERN DISTRICT OF ILLINOIS,
EASTERN DIVISION.

No. 52 C 2124

CLAUDINE M. MIKESELL, Administrator of the Estate of Charles Delbert Mikesell, *Plaintiff*,

v.

CHICAGO, ROCK ISLAND AND PACIFIC RAILROAD COMPANY, a Corporation, *Defendant*.

STATE OF ILLINOIS, }
COUNTY OF COOK. } ss.

WILLIAM DAVIS, being first duly sworn, deposes and says that he resides at 1815 South Highland Avenue, Lombard, Illinois, DuPage County, Illinois; that he has so lived there for fourteen years; that he is a partner in the Highland Metal Products Company, Hillside, Illinois; that he is a brother of M. L. Davis, who married Claudine Mikesell on May 2, 1953.

Affiant states that since March 1953, M. L. Davis had been living at his home in Lombard, Illinois, and that in the latter part of April 1953, M. L. Davis purchased a home in Lombard, Illinois, at 351 Elizabeth Drive.

Affiant further states that to his own knowledge M. L. Davis and Claudine M. Davis have been actually residing in the said home at 351 Elizabeth Drive, since between June 10 and June 15, 1953; that since said date they have lived there continuously and uninterrupted with their three children, two of whom were Mrs. Davis' by her marriage to Charles D. Mikesell, and the remaining child his brother's by his marriage to his deceased wife.

Affiant further states that two of the aforesaid three children attend school in Lombard, and that the said Claudine M. Davis participates in such civic activities as the Parent-Teachers Association and the Girl Scouts.

Further affiant sayeth not.

. . . . . .

. . . . . .

[Verification omitted]

. . . . . .

IN THE DISTRICT COURT OF THE UNITED STATES.
FOR THE NORTHERN DISTRICT OF ILLINOIS,
EASTERN DIVISION.

No. 52 C 2124

CLAUDINE M. MIKESELL, Administrator of the Estate of Charles Delbert Mikesell, *Plaintiff*,

v.

CHICAGO, ROCK ISLAND AND PACIFIC RAILROAD COMPANY, a Corporation, *Defendant*.

Memorandum.

In compliance with the mandate of the Circuit Court of Appeals in *Chicago, Rock Island and Pacific Railroad Company* v. *Igoe*, 7 Cir. 212 F. 2d 378, the order heretofore entered in this matter denying the transfer of the above cause has been vacated and further consideration has been given to the petition for transfer heretofore filed herein, as well as to all of the pleadings in this matter, including affidavits filed by both parties thereto since the cause has been remanded.

Upon consideration of all of the papers now on file in this case, I have reached the conclusion that it would not be for the convenience of the parties and witnesses, nor in the interest of justice to transfer this case to either of the Iowa Districts requested in the petition of the defendant.

IGOE,
Judge.

UNITED STATES DISTRICT COURT.

Office of the Clerk.

United States Court House.

Chicago 4.

Date: 7-8-54

Re: Mikesell, Adm. *vs.* C. R. I. & P. R. R. Co.

Case No. 52C 2124.

You are hereby notified that Judge Igoe entered the following order on 7-2-54:

In accordance with the Memorandum Opinion filed this day herein, defendants move to transfer cause to the Southern District of Iowa, Western Division or to the Southern District of Iowa, Central Division is denied.

ROY H. JOHNSON,
Clerk.

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IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 11247.

October Term, 1954, January Session, 1955.

CHICAGO, ROCK ISLAND AND PACIFIC RAILROAD COMPANY, a corporation, *Petitioner*,

v.

HONORABLE MICHAEL L. IGOE, Judge of the United States District Court for the Northern District of Illinois, Eastern Division, *Respondent*.

February 16, 1955.

Before DUFFY, *Chief Judge*, MAJOR, FINNEGAN, LINDLEY, SWAIM and SCHNACKENBERG, *Circuit Judges*.

DUFFY, *Chief Judge*. This is a petition for a Writ of Mandamus seeking an order directing the respondent to transfer from the United States District Court for the Northern District of Illinois, Eastern Division, to the District Court for the Southern District of Iowa, pursuant to 28 U. S. C. A. § 1404(a), the case entitled "Claudine M. Mikesell, Administrator of the Estate of Charles Delbert Mikesell, Deceased, plaintiff, *vs.* Chicago, Rock Island and Pacific Railroad Company, defendant, Civil Action No. 52 C 2124."

This proceeding is here for the second time. In the previous proceeding the respondent insisted that this Court did not have the power to entertain a petition for mandamus in a case of this nature. We held (*Chicago, R. I. & P. R. Co.* v. *Igoe*, 7th Cir., 212 F. 2d 378, 382) that mandamus would lie and after citing various authorities, including *Dairy Industries Supply Ass'n.* v. *LaBuy*, 7 Cir., 207 F. 2d 554 we said: "We adhere to the *Dairy Industries* decision and remand the cause to the District Court with directions to vacate the order denying the transfer and to reconsider petitioner's motion in the light of the views

expressed herein." After the remand the District Court entered an order again denying the petition to transfer, and filed a memorandum in which the District Judge stated: "* * * I have reached the conclusion that it would not be for the convenience of the parties and the witnesses, nor in the interests of justice to transfer this case to either of the Iowa Districts requested in the petition of the defendant."

On September 14, 1951, Charles D. Mikesell and Claudine Mikesell, husband and wife, were residents of Des Moines, Iowa. On that date Charles Mikesell was driving an automobile in the village of Avoca, Iowa, and in passing over the tracks of the Rock Island Railroad, was struck by a train operated by the Railroad and was killed. Avoca is located within the Western Division of the Southern District of Iowa. The District Court of Polk County, Iowa, issued letters of administration to Claudine Mikesell and on September 13, 1952, in her capacity as administrator, she commenced an action against said Railroad in the Superior Court of Cook County, Illinois, claiming damages for wrongful death.

The Railroad, on the grounds of diversity of citizenship, caused the Mikesell case to be removed from the Superior Court of Cook County to the United States District Court for the Northern District of Illinois. Thereafter, the Railroad filed a motion under 28 U. S. C. A. § 1404(a)[1] to transfer the cause to the United States District Court for the Southern District of Iowa for trial in either its Central Division sitting at Des Moines, or its Western Division sitting at Council Bluffs.

It is without dispute that on and prior to September 14, 1951, the date of the death of Charles Mikesell, he and his wife were residents of Des Moines, Iowa; that letters of administration were issued to plaintiff by the District Court of Polk County, Iowa; and plaintiff continued to

[1] "§ 1404(a) For the convenience of parties and witnesses in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought."

reside in Des Moines and was living there on the date when she commenced suit against the railroad in the Superior Court of Cook County, Illinois. Further, it is averred, in the affidavit filed upon behalf of the Railroad, that in order to defend plaintiff's action, petitioner wili be required to call two non-employee witnesses residing at Des Moines, six non-employee witnesses residing at Avoca and five employee witnesses residing at Des Moines and Avoca; that the testimony of said non-employee witnesses can be obtained only by subpoena and that the legal process of the United States District Court for the Northern District of Illinois does not extend to any of the localities where such witnesses reside. It was also shown that Des Moines is 358 miles from Chicago; that Avoca is 459 miles from Chicago, but that Avoca is 33 miles from Council Bluffs and 104 miles from Des Moines; that all of the witnesses petitioner expects to call in its defense are within the range of legal process which can be issued by the United States District Court for the Southern District of Iowa. Petitioner's affidavit also asserted that it would be impossible for it to properly present its defense by depositions as it could not, in advance, anticipate evidence which may be offered by the plaintiff.

Plaintiff opposed petitioner's motion to transfer and filed an affidavit which disclosed that on May 2, 1953 she married one M. L. Davis and since June, 1953, she and Davis have resided in Lombard, Illinois, in a home which they have purchased and that she now considers Lombard as her permanent residence.

Plaintiff's counsel filed an affidavit showing that petitioner's main offices are in Chicago, Illinois; that the train service between Avoca and Des Moines is poor, the trip consuming 2¼ hours, while the train service between Des Moines and Chicago was much more frequent, the trip taking about 6 hours. The affidavit also stated that plaintiff had hired an attorney residing in Chicago, Illinois, and that if the case were tried in Iowa that plaintiff would be put to the expense of hiring an additional attorney.

When the petition for transfer was first presented to the District Judge he denied the motion "* * * on the general proposition that the place where this accident occurred is about as close to Chicago as to Des Moines where you want to have the case tried, and this case was started in the State Court and you folks transferred it over to the Federal Building evidently for the purpose of having a trial, and as soon as it got here the only trial you wanted was to ship it out to Iowa, I don't think § 1404(a) was ever established or ever enacted for that reason * * *." In our previous opinion we pointed out that the reasons given by the District Judge for denying the petition were not valid, and we stated "The governing tests are expressly stated in the Act, and a leading mandamus case points up the correct guides to their application to a particular fact situation, which include 'the relative ease of access to sources of proof; availability of compulsory process for attendance of unwilling, and the cost of obtaining attendance of willing witnesses; possibility of view of premises, (if necessary); and all other practical problems that make trial of a case easy, expeditious and inexpensive * * *. The Court will weigh relative advantages and obstacles to fair trial. *Gulf Oil Corp.* v. *Gilbert*, 330 U. S. 501, 508.'" We then remanded this case with directions to vacate the order denying the transfer and to reconsider petitioner's motion in the light of the views that we expressed in our opinion.

Plaintiff invokes the doctrine of *res judicata* based on the statement in our previous opinion herein, "Ultimate decision on that motion is within the province of the District Court, and we cannot, as petitioner would have us do, usurp its function and decide the question in this court." All we intended to say was that the District Court must, initially, make the decision by applying the statutory tests laid down in § 1404(a), viz., "* * * convenience of the parties and witnesses, in the interest of justice * * *." We thought we clearly delineated the scope of our decision when we stated: "However, this opinion deals with the existence

of power only, not with the permissible limitations on its exercise." It is clear that the doctrine of *res judicata* has no application. Furthermore, we feel there is no inconsistency between this opinion and our previous opinion in this case.

In considering the three factors prescribed by the statute, the District Court should bear in mind that in filing an action the plaintiff is permitted to choose any proper forum and that the plaintiff's choice of forum should not be lightly set aside. In acting on such motion the District Judge has a broad discretion, but in exercising this discretion he is limited in his consideration to the three factors specifically mentioned in § 1404(a), and he may not properly be governed in his decision by any other factor or consideration. *Dairy Industries Supply Ass'n.* v. *LaBuy, supra,* pages 557-8.

Whether the plaintiff followed the litigation or whether, by an unusual coincidence, she moved to the Northern District of Illinois because of her second marriage, is, as we see it, not of great importance. Although plaintiff was not a witness to the collision at Avoca, Iowa, she, undoubtedly, might be called to testify at the trial as to undisputed matters, and we think, under the circumstances of this case, if the first test alone were to be considered, viz., "convenience of the parties" that the trial judge acted within his discretion in refusing to order the transfer. But the statute requires the application of two additional tests.

As to the second test "convenience of witnesses" it is self-evident that the convenience of both plaintiff's and defendant's witnesses would be served by a trial of the cause in the Southern District of Iowa. A number of witnesses reside at Avoca which is 459 miles from Chicago but only 33 miles from Council Bluffs and 104 miles from Des Moines, the two cities where the trial might be held. The other witnesses apparently all reside at Des Moines. Plaintiff's counsel argues that train service between Avoca and Des Moines is poor, but we assume the highways in that area are suitable for automobile travel, and that Iowa,

like other states, has the benefit of extensive bus service. There is nothing in this record to indicate the convenience of witnesses will be served by a trial in Chicago. There is no factual basis in this record for the respondent's conclusion to the contrary.

The third test under the statute is "in the interest of justice". The phrase connotes conditions which are in furtherance of the administration of justice. It has been held that the phrase should be given paramount consideration. *Greve* v. *Gibraltar Enterprises, Inc.*, 85 F. Supp. 410, 413. Both the interest of the parties to the lawsuit as well as society in general should be considered. *United States* v. *National City Lines, Inc.*, 7 F. R. D. 393, 397, 402. In the interest of justice there should be considered the relative ease of access to sources of proofs; availability of compulsory process for attendance of unwilling, and the cost of obtaining attendance of willing witnesses; the possibility of a view of the premises; and the state of the court calendar both in the District where the case is pending, and in the District to which it is sought to have the case transferred.

A number of courts have given consideration to the congested state of their calendars in considering a motion to transfer. *Rhoton* v. *Interstate R. Co.*, 123 F. Supp. 34; *Glasfloss Corporation* v. *Owens-Corning Fiberglas Corporation*, 90 F. Supp. 967; *United States* v. *E. I. Du Pont DeNemours & Co.*, 83 F. Supp. 233; *Hansen* v. *Nash-Finch Co.*, 89 F. Supp. 108; *Healy* v. *New York, New Haven & Hartford R. Co.*, 89 F. Supp. 614.

The calendar for the District Court of the Northern District of Illinois is congested.[2] There is no apparent reason

[2] The annual report of the Director of the Administrative Office of the U. S. Courts issued September, 1954 states: (A-27) "*The Northern District of Illinois*—This large metropolitan district with 8 judges succeeded in reducing the number of pending civil cases from 3170 to 2497, but the reduction was almost entirely in United States cases. The private caseload per judge both of cases filed and cases pending is far heavier than average and the median interval from filing to disposition was 15.1 months in 1954 as compared

why this case could not be brought to trial promptly in the Southern District of Iowa.

Possibly the real motive for plaintiff's vigorous opposition to the transfer of this case is the hope and expectation that a verdict for a larger sum would be returned in Chicago than in the Southern District of Iowa. Also, the Railroad might hope for a lower verdict in Iowa. Such results might well obtain, but we cannot consider those speculative factors as reasons either for or against a transfer, nor does § 1404(a) provide that the convenience of counsel is a factor to be considered. *United States* v. *Williams*, 88 F. Supp. 531, 535; *Henderson* v. *American Air Lines*, 91 F. Supp. 191, 193.

We agree with the statement of the court in *Josephson* v. *McGuire*, 121 F. Supp. 83, 84: "A large measure of deference is due to the plaintiff's freedom to select his own forum. Yet this factor has minimal value where none of the conduct complained of occurred in the forum selected by the plaintiff * * *." In this case there is no controverted question which depends on any event occurring in the Northern District of Illinois. Both parties must rely upon evidence of events entirely removed from that District. *B. Heller & Co.* v. *Perry*, 201 F. 2d 525, 527.

The writer of this opinion feels confident that had he been sitting in the District Court when the motion for transfer was made, an order for transfer would have been entered without hesitation. But what he or any other judge might have done in the circumstances is not the test we must apply in deciding this case. To warrant action by us, there must be something more than an erroneous decision. Our problem is, was the refusal by the District Judge to order the transfer, an abuse of discretion? *B. Heller &*

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with 14.8 months in 1953 and over 15.5 months for each of the three previous years. Although the court regularly disposes of a considerably larger number of cases per judge than the national average, a substantial reduction in the number of private cases is necessary to insure prompt disposition of civil business. Almost 80 percent of the cases filed in 1954 were private cases compared with the national average of 66 percent."

Co. v. *Perry*, 7 Cir., 201 F. 2d 525, 527; *Dairy Industries Supply Ass'n.* v. *La Buy*, 207 F. 2d 554, 558; *Ford Motor Co.* v. *Ryan*, 2 Cir., 182 F. 2d 329, Certiorari denied 340 U. S. 851. Was respondent's denial of the transfer "so clearly erroneous as to amount to an abuse of his discretion?" *General Portland Cement Co.* v. *Perry*, 7 Cir., 204 F. 2d 316, 319.

The only possible factor to support the refusal to transfer is that the plaintiff chose a state court in Cook County, Illinois, as a forum, and that about nine months after she commenced such action, she moved from the Southern District of Iowa to the Northern District of Illinois. We give little weight to the claim that plaintiff will be required to hire an Iowa attorney if the transfer is ordered.[3]

Factors under the statute which demonstrate that a transfer should be made are: convenience of witnesses of both plaintiff and defendant; the ease of access to sources of proof; the availability of compulsory process to compel the attendance of unwilling witnesses; the smaller amount of expense required for willing witnesses; the availability of a view of the premises; the congestion of the District Court calendar in the Northern District of Illinois, Eastern Division; that no controverted issue of fact depends upon any event that occurred in the Northern District of Illinois; and the burden of a jury trial should not be imposed upon the Northern District of Illinois, an area which has no relation to the litigation.[4]

Another factor to be considered is plaintiff acts in a representative capacity and was appointed by an Iowa

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[3] If plaintiff signed a contingent fee contract as is so often done in wrongful death cases, it is probable that any such expense would be an obligation of plaintiff's attorney.

[4] As was well stated in *Gulf Oil Corp.* v. *Gilbert*, 330 U.S. 501, 507, 508-9 "Factors of public interest also have a place in applying the doctrine. Administrative difficulties follow for Courts when litigation is piled up in congested centers instead of being handled at its origin. Jury duty is a burden that ought not to be imposed on the people of a community which has no relation to the litigation."

State Court. Authorization of that Court would be required in order for plaintiff to make a settlement, and plaintiff must account to that Court for any sums received by settlement or litigation, and distribution of any such sums would be under the jurisdiction of the Iowa State Court.

One additional point raised by the attorney for respondent should be noted. The claim is made that the petition for mandamus is insufficient because the names of the witnesses were not stated. The decision of this Court in *General Portland Cement Co.* v. *Perry*, 204 F. 2d 316 is cited. No request was made for the production of the names of defendant's witnesses. As far as this record shows all witnesses bearing on the subject of defendant's alleged liability reside in the Southern District of Iowa. In any event, the point was not raised in the Court below. Such objection cannot be raised here for the first time. *Hopkins* v. *Waco Products, Inc.*, 7 Cir., 205 F. 2d 221, 224; *Kainz* v. *Anheuser-Busch, Inc.*, 7 Cir., 194 F. 2d 737, 744; *Apex Smelting Co.* v. *Burns*, 7 Cir., 175 F. 2d 978, 982; *McComb* v. *Goldblatt Bros., Inc.*, 7 Cir., 166 F. 2d 387, 389-90.

The balance of convenience of the parties is so overwhelmingly in favor of the defendant that we hold the denial by respondent of the motion to transfer this case to the Southern District of Iowa was so clearly erroneous that it amounted to an abuse of discretion.

Let a Writ of Mandamus issue directing the Respondent 1) to vacate and set aside the order entered July 7, 1954; and 2) to enter an order transferring this cause for trial to the Southern District of Iowa, in either the Central or Western divisions thereof.

IT IS SO ORDERED.

FINNEGAN, *Circuit Judge*, dissenting. An *en banc* hearing as one of three oral arguments and two briefings, on each side, is quite enough of this case. Several serious matters of policy and principle, however, concerning mandamus,

impel me to expand this dissent and express my views on some broader aspects of the majority opinion. This entire episode illustrates problems following in the wake of generously encouraged repetitive invocations of mandamus.

I would have allowed the respondent Judge's motion to dismiss the Railroad's second petition for a writ of mandamus, and rested my determination on the reasons expressed in this dissent

A major point of my divergence, from the majority opinion, is stressed by tracing, chronologically, the various stages through which this matter passed after suit was filed, September 13, 1952, in the Superior Court of Cook County, Illinois. Petitioner here, defendant-Railroad, removed the case from that State court, October 6, 1952, to the district court below. Four days later petitioner invoked 28 U. S. C. § 1404(a) and moved for a transfer to one of two districts in Iowa, the Eighth Circuit. Objections to petitioner's motion were interposed, June 12, 1953, on behalf of the plaintiff-widow-administratrix. It was respondent's order, entered eight days later, which stimulated the Railroad's first petition for a writ of mandamus to compel the transfer, and that resulted in an opinion reported as *Chicago, R. I. & P. R. Co.* v. *Hon. M. L. Igoe*, 212 F. 2d 378 (7th Cir. 1954).

On remand ordered April 20, 1954, the basic factual showing remained unaltered, save in one respect hereinafter mentioned, and remarkably similar to that outlined in Judge Lindley's opinion (212 F. 2d 378) and now narrated in the Chief Judge's opinion. Confronted with the same papers originally tendered him by the Railroad and plaintiff's objections, by then implemented with her affidavit (filed June 24, 1954) concerning change of residence to Illinois sometime in May-June, 1953, respondent again denied this transfer.

At this juncture, and parenthetically at least, I recall marginal note 2 of *Chicago, R. I. & P. R. Co.* v. *Hon. M. L. Igoe*, 212 F. 2d 378, 379 (7th Cir. 1954), viz.:

"Respondent's answer to the petition avers that plaintiff, prior to June 30, 1953, the date petitioner's motion was denied, had moved to, and was a resident of the Northern District of Illinois, and on the basis of this averment denies the allegation of the petition that all witnesses to be called by either party are residents of the Southern District of Iowa. It was conceded on oral argument that plaintiff was not a witness to the accident, which caused the death of her decedent. On November 30, 1953, over petitioner's objection, respondent granted a motion that a statement as to this change of residence be certified to this court. Inasmuch as that fact was not before respondent when he denied petitioner's motion to transfer, it is not properly before us now and we do not consider it. *General Portland Cement Co.* v. *Perry*, 7 Cir., 204 F. 2d 316."

Judge Igoe, as part of his second denial, filed the following memorandum:

"In compliance with the mandate of the Circuit Court of Appeals in *Chicago, Rock Island and Pacific Railroad Company* v. *Igoe*, 7 Cir., 212 F. 2d 378, the order heretofore entered in this matter denying the transfer of the above cause has been vacated and further consideration has been given to the petition for transfer heretofore filed herein, as well as to all of the pleadings in this matter, including affidavits filed by both parties thereto since the cause has been remanded.

"Upon consideration of all of the papers now on file in this case, I have reached the conclusion that it would not be for the convenience of the parties and witnesses, nor in the interest of justice to transfer this case to either of the Iowa Districts requested in the petition of the defendant."

I also think the District Judge is entitled to have repeated the following representation made in his answer, and behalf, by his counsel:

"Respondent further states that he has faithfully discharged the discretion which the orderly administration of justice requires."

Now, the majority devotes part of their opinion to what "we intended to say" and "thought we clearly delineated . . . " in *Chicago, R. I. P. R. Co.* v. *Igoe,* 212 F. 2d 378 (7th Cir. 1954). Yet I find it difficult to so easily dilute the impact of Judge Lindley's final passage:

> "Ultimate decision on that motion is within the province of the District Court, and *we cannot, as petitioner would have us do, usurp its function and decide the question in this court.*" (ibid, 382; italics added.)

The Railroad's first petition for mandamus, then pending before the panel which approved that specific closing paragraph, sought precisely the same relief now granted, after petitioner's persistent efforts. Having announced we had "power," the writ was neither expressly granted nor denied. Facing up to realities, it seems to me the trial judge was simply given a second chance. Since he made the wrong choice on the second round, which incidentally was the same ruling precipitating remand, the writ issues.

Discretion, vested in the District Judge is the nub of this matter. Secret motives of either set of litigants, or their counsel are irrelevant—the trial judge stands alone. For that reason I disclaim the majority's statement, *i. e.,* ". . . we feel there is no inconsistency between this opinion and our previous opinion in this case." It is hardly sound justification for currently usurping the District Judge's function and deciding the question in this court, to say we were, at first, concerned solely with enunciating the existence of our "power." Regardless of how it is articulated, I think we now usurp, where once we refrained. Either the remand order gave the District Judge a Hobson's choice, or it left him with discretion. Nor can the inconsistency be dispelled by simply pointing up a sentence lurking in the first opinion (212 F. 2d 378, 381) viz.: "However, this opinion deals with the existence of power only, not with the permissible limitations on its exercise." For I find it difficult to conclude that the following portion of Judge Lindley's

opinion is merely dictum, if "power" was the sole decision point:

> "We adhere to the Dairy Industries decision and remand the cause to the District Court with directions to vacate the order denying the transfer and *to reconsider petitioner's motion in the light of the views expressed herein.*" (212 F. 2d 378, 382; italics added.)

The "views" concerned § 1404(a); and the District Judge reconsidered. Nowhere in its opinion has the majority shown why the writ did not issue the first time. I hardly think remand was ordered as a veiled threat predicated upon an announcement that we had power to issue the writ.

I think we should come to grips with the core issue—*abuse* of discretion, its existence or non-existence. If we are substituting our discretion for that of respondent we ought to say so and be done with it. We have no business, as I view it, balancing conveniences of the parties, and speculating upon their motivations.

Just how "society in general" merits consideration on a motion to transfer escapes me. That the words found in § 1404(a) "in the interest of justice must be given paramount consideration" is an unsupported view of a district court speaking in *Grove* v. *Gibraltar Enterprises, Inc.*, 85 F. Supp. 410, 413 (D. New Mexico, 1949). But if that epitomizes § 1404(a) then certainly it is a sweeping and elastic criteria. Respondent had a broad range of discretion under that prong of § 1404(a), even in light of the majority's reasoning.

What chiefly emerges from the repertory of ideas expressed in the majority's opinion is not a demonstration of discretion abused below, but rather a sliding scale of judgment values between reviewing tribunal and trial court.

My additional views coincide with those expressed by Judge Goodrich, speaking for a unanimous court in *All*

States Freight v. *Modarelli*, 196 F. 2d 1010-1011-1012 (3rd Cir. 1952):

"The second danger which threatens the usefulness of Section 1404(a) comes from the appellate courts. It is settled in this Circuit and elsewhere that an order either making a transfer or refusing a transfer is not appealable. Now the effort is being made both in this court and elsewhere to substitute for appeal a review by mandamus whenever the losing party on a motion to transfer wants an advance review of the ruling on this point.

"We think that this practice will defeat the object of the statute. Instead of making the business of the courts easier, quicker and less expensive, we now have the merits of the litigation postponed while appellate courts review the question where a case may be tried.

"Every litigant against whom the transfer issue is decided naturally thinks the judge was wrong. It is likely that in some cases an appellate court would think so, too. But the risk of a party being injured either by the granting or refusal of a transfer order is, we think, much less than the certainty of harm through delay and additional expense if these orders are to be subjected to interlocutory review by mandamus.

"We do not propose to grant such review where the judge in the district court has considered the interests stipulated in the statute and decided thereon * * *"

Our mandamus power is not a muscle which requires exercise to maintain its vitality. More slides into abdication, today, than a mere order of transfer finally wrested from our court.

* * * * * * * * * *

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

Chicago 10, Illinois

Wednesday, February 16, 1955

Before

HON. F. RYAN DUFFY, *Chief Judge*
HON. J. EARL MAJOR, *Circuit Judge*
HON. PHILIP J. FINNEGAN, *Circuit Judge*
HON. WALTER C. LINDLEY, *Circuit Judge*
HON. H. NATHAN SWAIM, *Circuit Judge*
HON. ELMER J. SCHNACKENBERG, *Circuit Judge*

No. 11247.

CHICAGO, ROCK ISLAND AND PACIFIC RAILROAD COMPANY, a corporation, *Petitioner*,

v.

HONORABLE MICHAEL L. IGOE, Judge of the United States District Court for the Northern District of Illinois, Eastern Division, *Respondent*.

On Petition for Writ of Mandamus.

This matter comes before the Court on the Petition for Writ of Mandamus, the Answer thereto, Briefs of counsel for the parties, and was argued by counsel.

On consideration whereof, it is ordered by this Court that a Writ of Mandamus issue directing the Respondent (1) to vacate and set aside the order entered July 7, 1954; and (2) to enter an order transferring this cause for trial to the Southern District of Iowa, in either the Central or Western Divisions thereof.

FILED
JUN 11 1955
HAROLD B. WILEY, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1954.

No. [redacted] 78

HONORABLE MICHAEL L. IGOE, JUDGE OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION,

Petitioner,

vs.

CHICAGO, ROCK ISLAND AND PACIFIC RAILROAD COMPANY,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1954.

No. 797.

HONORABLE MICHAEL L. IGOE, JUDGE OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION,

Petitioner,

vs.

CHICAGO, ROCK ISLAND AND PACIFIC RAILROAD COMPANY,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

OPINION BELOW.

The first opinion of the Court of Appeals in the mandamus proceedings held that the appellate court had jurisdiction to review orders relative to transfer under 28 U. S. C. 1404(a) by way of mandamus. *Chicago, Rock Island and Pacific Railroad Company* v. *Igoe*, 7 Cir., 212 F. 2d 378, 381 (April, 1954).

The second opinion of the Court of Appeals held that the denial by the Petitioner of the motion to transfer was so clearly erroneous that it amounted to an abuse of discretion. *Chicago, Rock Island and Pacific Railroad Company* v. *Igoe*, 7 Cir., 220 F. 2d 299, 305 (February, 1955).

QUESTION PRESENTED.

Where appeal is clearly inadequate, is the Court of Appeals *powerless* to review by mandamus an order denying a transfer under 28 U. S. C. 1404(a), when the denial is "so clearly erroneous that it amounted to an abuse of discretion"?

The petition erroneously asserts (page 2) that Petitioner applied "the proper legal standards", and acted "on conflicting facts". The facts were undisputed and overwhelmingly in favor of transfer, and Petitioner arbitrarily disregarded the proper legal standards.

STATUTES INVOLVED.

In addition to the statutes referred to in Petitioner's petition, this proceeding involves 28 U. S. C. 2106 (Act of June 25, 1948, 62 Stat. 963), which provides:

> The Supreme Court or any other court of appellate jurisdiction may affirm, modify, vacate, set aside or reverse any judgment, decree, or order of a court lawfully brought before it for review, and may remand the cause and direct the entry of such appropriate judgment, decree, or order, or require such further proceedings to be had as may be just under the circumstances.

28 U. S. C. 2101(c) (Act of June 25, 1948, 62 Stat. 961), which provides:

> Any other appeal or any writ of certiorari intended to bring any judgment or decree in a civil action, suit or proceeding, before the Supreme Court for review shall be taken or applied for within ninety days after the entry of such judgment or decree. A justice of the Supreme Court, for good cause shown, may extend the time for applying for a writ of certiorari for a period not exceeding sixty days.

REASONS FOR DENYING THE WRIT.

1. The petition for certiorari was not filed within the time prescribed by law. By its second judgment the Court of Appeals acted to enforce its first judgment, which Petitioner had disregarded.

2. The decision of the Court of Appeals is not in conflict with applicable decisions of this Court.

3. The decision of the Court of Appeals is not in conflict with the decision of another Court of Appeals on the same matter.

STATEMENT.

Petitioner's statement is neither accurate nor complete. It is best corrected by a complete statement on the part of the respondent.

The case in the District Court was a suit brought against respondent in September, 1952, in the state court of Illinois at Chicago, for damages for the death of Charles Delbert Mikesell in an Iowa grade crossing accident of September, 1951 (P. 3-4, App. 17a).* It was brought under the Iowa Wrongful Death statute (Section 635.9 Iowa Statutes 1954), by the widow of deceased, Claudine M. Mikesell, as Administrator of his estate (hereinafter referred to as "plaintiff") (P. 3-4; App. 17a).

At the time of the accident plaintiff and her husband resided in Des Moines, Iowa, and plaintiff resided there at the time the suit was brought (App. 3a, 7a). Plaintiff was appointed Administrator by the District Court of Polk County, Iowa, and continues to act in that capacity (App. 3a, 27a). Respondent, a Delaware corporation, removed the case to the District Court for the Northern District of

* Figures in parenthesis following the letter "P." indicate pages of Petitioner's petition; figures following the letters "App." indicate pages of the appendix of the petition.

Illinois, Eastern Division, at Chicago, upon the ground of diversity of citizenship (App. 7a).

In October, 1952, respondent moved for the transfer of the case under 28 U. S. C. 1404(a) to the District Court of the United States for the Southern District of Iowa, either at Des Moines, in the Central Division, or at Council Bluffs, in the Western Division (P. 4, App. 1a).

The motion to transfer was supported by an affidavit to the effect that plaintiff was a resident of Des Moines, Iowa, in the Southern District of Iowa; that the accident occurred at Avoca, Iowa, in said district; that all witnesses to be called by the defendant reside at either Des Moines or Avoca; that a trial in the Northern District of Illinois would deprive the defendant of process to compel the attendance of eight non-employee witnesses; that Avoca is 459 miles from Chicago, but only 100 miles from Des Moines; that a trial at Chicago would necessarily impose excessive expense upon the defendant in procuring such voluntary witnesses as would go there to testify; that each of such witnesses would lose some five days; that defendant's defense could not be appropriately presented by deposition; *that any witnesses to be called by plaintiff on any disputed issue necessarily resided in or near either Des Moines or Avoca*; and that the defendant was amenable to process in both the Central and Western Divisions of the District Court for the Southern District of Iowa (App. 3a-6a).

Plaintiff, concededly not a witness to the accident (App. 18a), objected to the motion, averring that she was a resident of Des Moines; that the suit was removed from the Superior Court of Cook County, Illinois, to the federal court on defendant's motion; that defendant was a Delaware corporation and maintained its principal offices in Chicago; that better train service was provided between Chicago and Des Moines than between Des Moines and

Council Bluffs; that Des Moines was the second largest insurance center in the nation; that if the cause were tried at Council Bluffs it would be equally difficult for plaintiff to obtain the testimony of her witnesses who are residents of Iowa; that plaintiff was represented by Chicago counsel; and that defendant sought, by its motion to transfer, a forum more favorable to its cause (App. 7a-15a).

On June 30, 1953, the Petitioner denied the motion to transfer "on the general proposition that the place where this accident occurred is about as close to Chicago as to Des Moines[1] where you want to have the case tried, and this case was started in the State Court and you folks transferred it over to the Federal Building evidently for the purpose of having a trial, and as soon as it got here the only trial you wanted was to ship it out to Iowa. I don't think Section 1404(a) was ever established or ever enacted for that reason" (App. 16a, 22a-23a).

On August 4, 1953, respondent applied to the Court of Appeals for the Seventh Circuit for a writ of mandamus directing the Petitioner to vacate his order denying the transfer, and to enter an order transferring the cause to the Southern District of Iowa (P. 5).

On April 20, 1954, the Court of Appeals held (App. 17a, 22a-23a; 212 F. 2d 378, 381-2):

> "We conclude that we have jurisdiction to review orders relative to transfer under Section 1404(a) by way of mandamus. However, this opinion deals with the existence of power only, not with the permissible limitations on its exercise."
>
> • • • • •
>
> "The fact that the cause is in the district court by removal from a state court has no bearing on a motion to transfer. Once removed, the action proceeds as if it had been brought in the federal court orig-

1. Actually Avoca, Iowa is 300 miles farther from Chicago (App. 4a).

inally. * * * It would seem clear, therefore, that respondent (Petitioner herein) 'denied the motion upon an asserted legal premise which in fact does not exist.' "

* * * * *

"Respondent (Petitioner herein) earnestly contends, however, that the order should stand inasmuch as one forum to which transfer is sought is a noted insurance center, and a trial there would be prejudicial to plaintiff. However, neither party to this cause is an insurance company. The averment is wholly irrelevant."

The Court of Appeals remanded the cause to the District Court with directions to vacate the order denying the transfer and to reconsider the motion to transfer in the light of the views expressed in its opinion (App. 24a, 26a; 212 F. 2d 378, 382).

On remand plaintiff filed additional affidavits showing that in June, 1953 (*over 8 months after the action had been instituted*) she had remarried and moved to Lombard, Illinois (App. 27a-31a).

On July 2, 1954, the Petitioner again denied respondent's motion to transfer, by a memorandum which stated (App. 32a):

"Upon consideration of all the papers now on file in this case, I have reached the conclusion that it would not be for the convenience of the parties and witnesses, nor in the interest of justice to transfer this case to either of the Iowa Districts requested in the petition of defendant."

On August 7, 1954, the respondent again applied to the Court of Appeals for the Seventh Circuit for a writ of mandamus directing the Petitioner to vacate his order denying the transfer, and to enter an order transferring the cause to the Southern District of Iowa (P. 6). On February 16, 1955, the Court of Appeals issued a writ of

mandamus directing the Petitioner to vacate and set aside the order denying the transfer, and to enter an order transferring the cause for trial to the Southern District of Iowa, in either the Central or Western divisions thereof (App. 34a, 42a, 48a; 220 F. 2d 299, 305).

In directing the writ of mandamus to issue (220 F. 2d 299) the Court held (App. 42a; 220 F. 2d at 305):

> "The balance of convenience of the parties is so overwhelmingly in favor of the defendant that we hold the denial by respondent of the motion to transfer this case to the Southern District of Iowa was so clearly erroneous that it amounted to an abuse of discretion."

The Court of Appeals held that the writ of mandamus would issue to compel the transfer for the reason that no controverted issue of fact depends on any event that occurred in the Northern District of Illinois; that convenience of both plaintiff's and respondent's witnesses would be served by a trial of the cause in the Southern District of Iowa; and that the plaintiff remains subject to the jurisdiction of the Iowa state court which appointed her administrator (App. 34a-42a; 220 F. 2d 299, 301-5).

ARGUMENT.

I.

The petition for certiorari was not filed within the time prescribed by law.

A writ of certiorari intended to bring any judgment before this Court for review must be applied for within 90 days after the entry of the judgment, unless the time has been extended by a Justice of the Court. 28 U. S. C. 2101(c).

Petitioner contends that mandamus does not lie to review an order denying transfer under 28 U. S. C. 1404(a). The judgment of the Court of Appeals holding that the court had jurisdiction to review by mandamus Petitioner's original order denying transfer, was entered April 20, 1954 (App. 17a; *Chicago, Rock Island & Pacific R. Co.* v. *Igoe,* 212 F. 2d 378). Petition for certiorari herein was filed May 13, 1955. There has been no extension of time.

As appears from our Statement and Argument II, the second judgment of the Court of Appeals was necessary to enforce the mandate of the first judgment that the District Court "reconsider" defendant's motion to transfer "in the light of the views expressed in the opinion of this Court filed this day" (App. 26a). The Court of Appeals had the power to so enforce the mandate of its first judgment. 28 U. S. C. 2106;[1] *Ex Parte Krentler-Arnold*

1. "The Supreme Court or any other court of appellate jurisdiction may affirm, modify, vacate, set aside or reverse any judgment, decree, or order of a court lawfully brought before it for review, and may remand the cause and direct the entry of such appropriate judgment, decree, or order, or require such further proceedings to be had as may be just under the circumstances."

Hinge Last Co., 286 U. S. 533; *Wilbur* v. *United States*, 281 U. S. 206, 218-19.

It results that the petition for certiorari was not filed within the time prescribed by law.

II.

In taking jurisdiction by mandamus, vacating Petitioner's denial of respondent's motion to transfer, and directing Petitioner to transfer the case to the Southern District of Iowa, the Court of Appeals ruled in accordance with reason and authority. Its decision is not in conflict with applicable decisions of this Court, or with a decision of another Court of Appeals on the same matter.

The facts stated in the affidavit supporting respondent's motion to transfer (summarized on page 4, *supra*) were undisputed. The facts asserted in the opposing affidavit of plaintiff's counsel (summarized on pages 4-5, *supra*) were not pertinent to the question of whether a transfer would be for the convenience of the parties and witnesses and in the interest of justice (28 U. S. C. 1404(a); *Chicago, Rock Island & Pacific R. Co.*, 212 F. 2d at 382 and cases cited).

The undisputed facts overwhelmingly establish the right to transfer. All of the witnesses were located and subject to process in the Southern District of Iowa, and beyond process of the District Court at Chicago. *The interest of justice manifestly demands that the District Court at Chicago be relieved of the burden of trying the case by the transfer of it to the Southern District of Iowa, where the witnesses are located and subject to process of the court; where the accident occurred and plaintiff was appointed Administrator, and where the Court is necessarily more familiar with the applicable Iowa law.*

The fact that plaintiff moved to Illinois 8 months after bringing the suit, asserted in the affidavits filed after the first hearing by Petitioner (App. 27a-31a), is unimportant (220 F. 2d at 303). It is undisputed that plaintiff is still acting as an administrator appointed by an Iowa court, in prosecuting an action under the Iowa Wrongful Death Act. Plaintiff was not a witness to the accident (App. 18a). *It remains undisputed that all witnesses for either plaintiff or defendant who can testify to controverted facts are located in the Southern District of Iowa and subject to the process of a District Court of that District.*

The undisputed facts were "so overwhelmingly in favor of the defendant" that the denial by Petitioner of defendant's motion to transfer[2] "was so clearly erroneous that it amounted to an abuse of discretion" (App. 42a; *Chicago, Rock Island & Pacific R. Co.* v. *Igoe*, 220 F. 2d 299, 305).

Delay complained of at page 8 of the petition was not the fault of the proper efforts of respondent to obtain a transfer of the case to Iowa. The delay is chargeable to the bringing of the suit in Illinois, to plaintiff's resistance to the motion to transfer, and to Petitioner's arbitrary denial of the motion.

The affidavit of plaintiff's counsel asserts that it would be as difficult for plaintiff to obtain testimony of Iowa witnesses at Council Bluffs as it would to obtain them at Chicago (App. 14a). If such be the case Petitioner is free to give plaintiff the choice of a trial at Des Moines, under the judgment of the Court of Appeals (App. 48a).

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2. For the convenience of the parties and witnesses and in the interest of justice. 28 U. S. C. 1404(a).

The decision of the Court of Appeals is not in conflict with applicable decisions of this Court.

The Court of Appeals has power to "issue all writs necessary or appropriate in aid of * * * (its) jurisdiction(s) and agreeable to the usages and principles of law,"[3] and has power to "affirm, modify, vacate, set aside or reverse any judgment, decree or order of a court lawfully brought before it for review, and may remand the cause and direct the entry of such appropriate judgment, decree or order * * * as may be just under the circumstances."[4]

The Court of Appeals for the Seventh Circuit had the power to make such disposition of the case as justice required. *Bryan* v. *United States,* 338 U. S. 552, 554-558; *Wilbur* v. *United States,* 281 U. S. 206, 218.

Clearly mandamus is the proper remedy and the only remedy to review an order denying a transfer pursuant to 28 U. S. C. 1404(a). The injury to the respondent cannot be corrected by appeal from the order complained of since the order is interlocutory and not appealable. *Jiffy Lubricator, Inc.* v. *Stewart-Warner Co.,* 4 Cir., 177 F. 2d 360; *Ford Motor Co.* v. *Ryan,* 2 Cir., 182 F. 2d 329, 330. Nor can the injury to respondent be corrected upon appeal from an adverse final judgment below because respondent will not be able to show that a different result would have been reached had the case been tried in the proper jurisdiction, to wit: the Southern District of Iowa; and even if respondent should eventually secure a judgment on the merits below, it will be unable to recover as costs the additional expense incurred by it due to Petitioner's failure to order the transfer. *Ford Motor Co.* v. *Ryan,* 2 Cir., 182 F. 2d 329, 330.

3. 28 U. S. C. 1651(a).
4. 28 U. S. C. 2106.

Mandamus is the only remedy whereby the statutory factors providing for the convenience of the parties, convenience of the witnesses, and in the interest of justice can be protected. Upon appeal from a final judgment of the district court the inconvenience of the parties and the inconvenience of the witnesses, would be a moot question. *The factors, convenience of parties and witnesses, must in their nature be reviewed before trial, if at all. Gulf Research & Development Co.* v. *Leahy*, 3 Cir., 193 F. 2d 302, 305; *Pennsylvania Turnpike Commission* v. *Welsh*, 3 Cir., 188 F. 2d 447, 449, Footnote 2.

An order denying transfer under 28 U. S. C. 1404(a), is the type of order which may, in absence of power of the appellate court to correct it, give rise to judicially sanctioned procedural injury. The effect would be to deprive litigants of forums to which they are entitled, and as such is properly rectified by mandamus. *Ex Parte Simons*, 247 U. S. 231, 239; *Ex Parte Peterson*, 253 U. S. 300; *McCullough, et al.* v. *Cosgrave*, 309 U. S. 634; *Los Angeles Mfg. Corporation* v. *James*, 272 U. S. 701.

In *Ex Parte Fahey*, 332 U. S. 258, 260, this Court recognized that the inadequacy of remedy by appeal is a basis for mandamus. This Court has held that "the common law writs, like equitable remedies, may be granted or withheld in the sound discretion of the court." *Roche* v. *Evaporated Milk Assn.*, 319 U. S. 21, 25; *Ex Parte Peru*, 318 U. S. 578, 584. In *Roche* it was also held (page 31) that it is a function of mandamus to correct an abuse of judicial power.

Petitioner is contending that although appeal is clearly inadequate the Court of Appeals is powerless to utilize the remedy of mandamus to review an order denying a transfer under 28 U. S. C. 1404(a), when the denial is "so clearly erroneous that it amounted to an abuse of discretion." This contention is tantamount to arguing

that a district court is under no duty to comply with the statutory mandate of Congress because there is no remedy to force proper compliance. Such a contention completely ignores the holding of this Court in *United States* v. *National City Lines*, 334 U. S. 573, 588-89, that "Congress's mandate regarding venue and the exercise of jurisdiction is binding upon the federal courts."

Bankers Life & Casualty Co. v. *Holland*, 346 U. S. 379, relied upon at page 15 of the petition, is distinguishable for the reason that it involved a question of total want of venue which could be adequately corrected upon appeal from final judgment. It was nevertheless recognized (346 U. S. at 383) that "the supplementary review power conferred on the courts by Congress in the All Writs Act" can be used "where there is clear abuse of discretion or usurpation of judicial power". It was so held in *DeBeer Consolidated Mines* v. *U. S.*, 325 U. S. 212, 217.

Mandamus is the proper remedy to review an order denying transfer for the reason that the remedy is in aid of the appellate jurisdiction of the court. By such remedy the appellate court is able to compel an inferior court to relinquish a jurisdiction which it could not properly exercise. *Ex Parte Skinner & Eddy*, 265 U. S. 86, 95-6; *Roche* v. *Evaporated Milk Assn.*, 319 U. S. 21, 32; *U. S. Alkali Assn.* v. *U. S.*, 325 U. S. 196, 202-4.

The power of a federal appellate court to review an order denying a transfer under 28 U. S. C. 1404(a) by mandamus is implicit in *Ex Parte Collett*, 337 U. S. 55; *Kilpatrick* v. *Texas & Pacific Ry. Co.*, 337 U. S. 75; and *United States* v. *National City Lines*, 337 U. S. 78.

In the majority opinion in the case of *Norwood* v. *Kirkpatrick*, decided April 11, 1955, 99 L. Ed. 461, 463, it was said that since the District Judge properly construed Section 1404(a) "it is unnecessary to pass upon the question of

whether mandamus or prohibition is a proper remedy." The minority opinion, however, necessarily proceeded upon the theory that mandamus was the proper remedy.

In his second denial of transfer, upon the same controlling facts, Petitioner merely stated that the transfer "would not be for the convenience of the parties and witnesses nor in the interest of justice" (App. 32a). The second denial was necessarily arbitrary, an abuse of discretion, and in disregard of the first mandate of the Court of Appeals directing Petitioner to reconsider the motion in light of the opinion setting out the proper legal standards for transfer under 28 USC 1404(a) (App. 17a-26a; 212 F. 2d 378). *Ex Parte Krentler-Arnold Hinge Last Co.*, 286 U. S. 533. *Wilbur* v. *United States*, 281 U. S. 206, 218-19.

It is submitted that the decision of the Court of Appeals is in harmony with decisions of this Court.

The decision of the Court of Appeals is not in conflict with the decision of another court of appeals on the same matter.

The courts of appeal have uniformly held that mandamus will lie to review an order denying a transfer under 28 U. S. C. 1404(a).

Second Circuit—*Ford Motor Co.* v. *Ryan*, 182 F. 2d 329, Certiorari denied 340 U. S. 851.

Third Circuit—*Paramount Pictures* v. *Rodney*, 186 F. 2d 111, Certiorari denied 340 U. S. 953.

Sixth Circuit—*Sun Oil Co.* v. *Lederle, et al.*, 199 F. 2d 423.

Seventh Circuit—*Chicago, Rock Island and Pacific Railroad Co.* v. *Igoe*, 212 F. 2d 378.

Ninth Circuit—*Shapiro* v. *Bonanza Hotel Co.*, 185 F. 2d 777.

In the other circuits this matter has not been considered.

Although the jurisdictional issue was not raised, the existence of the mandamus power is of the essence in *C O Two Fire Equipment Co.* v. *Barnes,* 7 Cir., 194 F. 2d 410, affirmed *Cardox Corp.* v. *C O Two Fire Equipment Co.,* 344 U. S. 861; *Fettig Canning Co.* v. *Steckler,* 7 Cir., 188 F. 2d 715, certiorari denied 341 U. S. 951; *All States Freight* v. *Modarelli,* 3 Cir., 196 F. 2d 1010.

The *Josephson* case of the 1st Circuit and the *Carr* case of the 8th Circuit relied upon by the Petitioner are not in point. These cases merely dealt with the reviewability of an order *granting* transfer under 28 U. S. C. 1404(a).

CONCLUSION.

It is respectfully submitted that the petition for writ of certiorari should be denied because it was not filed within 90 days from the first judgment of the Court of Appeals, and because the decision of the Court of Appeals is not in conflict with applicable decisions of this Court, or with the decision of another court of appeals on the same matter.

Respectfully submitted,

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